(1)

92-1292

No.

Supreme Court, U.S.
FILED
JAN 25 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

LUTHER R. CAMPBELL a/k/a LUKE SKYYWALKER, CHRISTOPHER WONGWON a/k/a FRESH KID ICE, MARK ROSS a/k/a BROTHER MARQUIS, DAVID HOBBS a/k/a MR. MIXX; professionally known as THE 2 LIVE CREW; LUKE SKYYWALKER RECORDS,

Petitioners,

vs.

ACUFF-ROSE MUSIC, INC.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

ALAN MARK TURK
ALAN MARK TURK, ATTORNEY, P.C.
Attorney for Petitioners
200 Fourth Avenue, North
Suite 820
Nashville, Tennessee 37219
(615) 726-2999

3143
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

131 pp

QUESTIONS PRESENTED

1. Whether this Honorable Court's decision in *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) and in *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985) effectively overruled prior decisions of the Court of Appeals for the Second Circuit and the Court of Appeals for the Ninth Circuit by implying that a commercial parody of an original work is presumptively an unfair use even if the commercial parody is a creative derivative work?

2. Whether the majority opinion of the Court of Appeals for the Sixth Circuit erred in holding that the "commercial use" presumption established by this Honorable Court in *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), is not governed by Rule 301 of the Federal Rules of Evidence?

3. Whether a creative derivative work, such as a musical parody, despite its commercial purpose, can be afforded protection under 17 U.S.C. § 107 because of its importance as a form of social criticism?

4. Whether a copyright holder has a protected interest in the potential market for parodies of his original work, even if the original work does not compete with any existing parody of the original work?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Citations	iii
Opinions Below	1
Statement of Jurisdiction	2
Statute Involved	2
Statement of the Case	3
Reasons for Granting the Writ	6
I. Whether this Honorable Court's decision in *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) and in *Harper & Row Publishers, Inc. v. Nation Enterprises,* 471 U.S. 539 (1985) effectively overruled prior decisions of the Court of Appeals for the Second Circuit and the Court of Appeals for the Ninth Circuit by implying that a commercial parody of an original work is presumptively an unfair use even if the commercial parody is a creative derivative work.	6
II. Whether the majority opinion of the Court of Appeals for the Sixth Circuit erred in holding that the "commercial use" presumption established by this Honorable Court in *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), is not governed by Rule 301 of the Federal Rules of Evidence.	15
III. Whether creative derivative work, such as a musical parody, despite its commercial purpose, can be afforded protection under 17 U.S.C. § 107 because of its importance as a form of social criticism.	16
IV. Whether a copyright holder has a protected interest in the potential market for parodies of his original work, even if the original work does not compete with any existing parody of the original work.	21
Conclusion	29

Contents

TABLE OF CITATIONS

Cases Cited:

Berlin v. EC Publications, Inc., 329 F.2d 541 (2nd Cir. 1964) 8

Elsmere Music Inc. v. National Broadcasting Co., 623 F.2d 252 (2nd Cir. 1989) 8, 20

Fisher v. Dees, 794 F.2d 432 (9th Cir. 1986) 8, 12, 13, 24

Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985) .....i, 6, 7, 8, 9, 10, 11, 12, 13, 17

Hill v. Whalen, 220 F. 359 (S.D.N.Y. 1914) 26

Contents

	Page
In re Yoder Company, 758 F.2d 1114 (6th Cir. 1985)	16
Pacific & Southern Co. v. Duncan, 74 F.2d 1490 (11th Cir. 1984), cert. denied, 471 U.S. 104 (1985)	17
Pillsbury Co. v. Milky Way Productions, Inc., 215 U.S.P.Q. 124 (D.C.N.Ga. 1981)	22
Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303 (2d Cir. 1966)	27
Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417 (1984)	i, 6, 7, 9, 12, 13, 15
University of Notre Dame v. Twentieth Century-Fox, 256 N.Y.S. 2d 301 (1965)	23
Rules Cited:	
Federal Rule of Civil Procedure 56	4, 5
Federal Rule of Civil Procedure 67	4
Federal Rule of Evidence 301	i, 15, 16, 29
Supreme Court Rule 10.1(a)	2
Statutes Cited:	
17 U.S.C. § 107	i, 2, 8, 11, 14, 16
17 U.S.C. § 301	5

Contents

	Page
Other Authorities Cited:	
Even, David, Great Men of American Popular Song, Prentice Hall (1970)	19
Howard, John Tasker, Our American Music: A Comprehensive History From 1620 to the Present, Crowell (1965)	19
H.R. No. 94-1476, 94th Cong., 2d Sess. 66 (1976) (House Report, reprinted in [1976] U.S. Code Cong. & Admin. News	17
Ren. Rep. No. 473, 94th Cong. 1st Sess. 62 (1975) (Senate Report)	17
APPENDIX	
Appendix A — Opinion of the United States Court of Appeals for the Sixth Circuit Filed August 17, 1992	1a
Appendix B — Memorandum Opinion and Order of the United States District Court for the Middle District of Tennessee, Nashville Division	35a
Appendix C — Complaint Filed June 18, 1990 with Exhibits	57a
Appendix D — Affidavit of Oscar Brand Sworn to July 31, 1990 with Exhibits	70a

Contents

Page

Appendix E — Affidavit of Luther Campbell Sworn to July 31, 1990 with Exhibits 79a

No.

In The

Supreme Court of the United States

October Term, 1992

LUTHER R. CAMPBELL, a/k/a LUKE SKYYWALKER, CHRISTOPHER WONGWON a/k/a FRESH KID ICE, MARK ROSS a/k/a BROTHER MARQUIS, DAVID HOBBS a/k/a MR. MIXX; professionally known as THE 2 LIVE CREW; LUKE SKYYWALKER RECORDS,

Petitioners,

vs.

ACUFF-ROSE MUSIC, INC.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the district court is reported at 754 F. Supp. 1150 (Tenn. M.D. 1991) and is reproduced in Appendix B: App. pp. 35a-56a. The opinion of the United States Court of Appeals for

the Sixth Circuit is reported at 972 F.2d 1429 (6th Cir. 1992), and is reproduced in Appendix A: App. pp. 1a-34a.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on August 17, 1992. Appendix A: App. pp. 1a-34a. The order of the United States Court of Appeals for the Sixth Circuit denying an *en banc* rehearing was entered on October 26, 1992. Jurisdiction of this Court is based on Rule 10.1(a) of the Rules of the Supreme Court.

STATUTE INVOLVED

17 U.S.C. § 107 provides:

> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include -
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

STATEMENT OF THE CASE

Roy Orbison and William Dees were the co-authors of an original musical work entitled "Oh, Pretty Woman." In 1964, Roy Orbison and William Dees assigned their rights in "Oh, Pretty Woman" to the Respondent. On August 26, 1964, the Respondent registered "Oh, Pretty Woman" for copyright protection under the Copyright Registration No. EP-191739.

The Petitioners, collectively known as The 2 Live Crew, are a popular rap music group. On July 5, 1989, the Petitioners, through their general manager, Linda Fine, wrote Gary [*sic.* Gerry] Teifer of Acuff-Rose Music, Inc., informing him that The 2 Live Crew had written a parody of "Oh, Pretty Woman" entitled "Pretty Woman." Ms. Fine advised Acuff-Rose Music, Inc. that the Petitioners intended to afford it, Mr. Dees, and Mr. Orbison all credit evidencing their ownership and authorship of the song, "Oh, Pretty Woman," and that the Petitioners intended to pay the statutory rate for the use of said song. Ms. Fine enclosed a copy of the lyrics and a recording of the parody for his review. Appendix E: Affidavit of Luther Campbell, Exhibit A, App. pp. 83a-84a. On July 17, 1989, Gerry Teifer responded, in writing, to Ms. Fine's correspondence and stated that "I must inform you that we cannot permit the use of parody of 'Oh, Pretty Woman'." Appendix E: Affidavit of Luther Campbell, Exhibit B, App. p. 85a. The Petitioners, over the objection of the Respondent, released on July 15, 1989, the album *As Clean As They Wanna Be,* including the parody "Pretty Woman."

On June 18, 1990, Acuff-Rose filed suit alleging that The 2 Live Crew willfully infringed and commercially exploited its rights in the song "Oh, Pretty Woman" under the United States Copyright Act, interfered with the Respondent's business relations and interfered with the Respondent's prospective business advantage. Appendix C: Complaint, App. pp. 57a-69a.[1] The Petitioners, in response to the Complaint, filed a Motion to Dismiss asserting that, in accordance with Rule 56 of the Federal Rules of Civil Procedure, the Court should dismiss the Respondent's Complaint. R. 3: Motion to Dismiss; R. 5: Memorandum; R. 17: Supplemental Memorandum; Appendix D: Affidavit of Oscar Brand, App. pp. 70a-78a; Appendix E: Affidavit of Luther Campbell, App. pp. 79a-88a; Appendix F: Affidavit of M. William Krasilovsky, App. pp. 89a-94a.

The Petitioners then moved in accordance with Rule 67 of the Federal Rules of Civil Procedure to deposit with the trial court certain funds, as if The 2 Live Crew's version was a derivative work of the Respondent's copyrighted work and calculated the amount deposited based upon the statutory mechanical rate under the Copyright Act. R. 6: Motion to Deposit Funds. The trial court granted the Petitioners' Motion and the funds were interpled. The trial court did not comment on the adequacy of the deposit made. R. 11: Order.

---

1. Attached as Exhibit D to the Complaint was an audio cassette of "Oh, Pretty Woman" as recorded by Roy Orbison. Attached as Exhibit E to the Complaint was an audio cassette of "Pretty Woman" as recorded by the Petitioners. The Petitioners have lodged a copy of each audio cassette with this Honorable Court, so that a comparison of the two songs can be made. Exhibit B of the Complaint, a photocopy of the CD cover and CD, has also been lodged with the Court. Exhibit I, sheet music, to Appendix D, the Affidavit of Oscar Brand, has also been lodged with the Court. Exhibits C and D, the CD cover and CD attached to Appendix E, the Affidavit of Luther Campbell, have also been lodged with the Court.

In response, Acuff-Rose Music, Inc. filed the Declaration of its agent, Gerald Teifer, and the Declaration of a musicologist, Earl Speilman. R. 13: Response; R. 16: Declaration of Gerald Teifer; R. 14: Declaration of Earl Speilman. These declarations did not place any material facts in dispute.

On January 14, 1991, the trial court granted the Petitioners' motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The trial court dismissed all three counts of the Respondent's Complaint because "no genuine issue of material fact exists regarding the allegation of copyright infringement." The trial court further held that "The plaintiff's pendent tort claims are preempted by 17 U.S.C. § 301." Appendix B: App. p. 35a. The trial court further held that "This decision does not address whether that sum [the amount interpled by Petitioners] reflects *adequate compliance* with the Act." Appendix B: App. p. 37a. [emphasis added]

The Respondent requested, and the trial court granted, certification for an interlocutory appeal. R. 29: Motion. The Court of Appeals for the Sixth Circuit denied certification and rejected the appeal. R. 32: Order. Thereafter, the Respondent filed two Motions, the first to amend its Complaint and raise new allegations under the Lanham Act and the second to distribute the funds interpled or allow further briefing. R. 35: Motion to Amend; R. 34: Motion to Distribute Funds or Allow Further Briefing. The trial court denied the Motion to Amend and granted the Motion to Allow Further Briefing. R. 43: Order. On October 2, 1991, the trial court entered a final Order, returning the interpled funds to the Petitioners and confirming its summary judgment previously granted. R. 47: Order.

On October 14, 1991, the Respondent filed a notice of appeal. R. 50: Notice of Appeal. On August 17, 1992, the Court of Appeals for the Sixth Circuit, by split decision, reversed and remanded the trial court's order granting the Petitioners' summary judgment.

Appendix A: App. pp. 1a-34a. On August 26, 1992, the Petitioners filed a Petition for Rehearing En Banc in the Court of Appeals for the Sixth Circuit. On October 26, 1992, the Court of Appeals for the Sixth Circuit denied the Petitioners' Petition for Rehearing.

REASONS FOR GRANTING THE WRIT

I.

WHETHER THIS HONORABLE COURT'S DECISION IN *SONY CORP. V. UNIVERSAL CITY STUDIOS, INC.*, 464 U.S. 417 (1984) AND IN *HARPER & ROW PUBLISHERS, INC. V. NATION ENTERPRISES*, 471 U.S. 539 (1985) EFFECTIVELY OVERRULED PRIOR DECISIONS OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT AND THE COURT OF APPEALS FOR THE NINTH CIRCUIT BY IMPLYING THAT A COMMERCIAL PARODY OF AN ORIGINAL WORK IS PRESUMPTIVELY AN UNFAIR USE EVEN IF THE COMMERCIAL PARODY IS A CREATIVE DERIVATIVE WORK.

The Court of Appeals for the Sixth Circuit, in its majority opinion in the case at bar, has misapplied this Honorable Court's holdings in *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) and in *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985). In both *Sony* and *Harper & Row*, this Honorable Court held that "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright." *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. at 451 (1984); *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. at 562 (1985).[2] The Court of Appeals for the Sixth Circuit both

2. In the Sony case, this Court held that the commercial use presumption had been rebutted by the Respondent. 464 U.S. 417 (1984).

misapplied the commercial use presumption to a created derivative work such as a musical parody, and strengthened the presumption. Justice Brennan in his dissenting opinion in *Harper & Row*, predicted that the commercial use presumption created by this Court in *Sony* would be misapplied and misused to limit the dissemination of creative derivative works. Judge Brennan argued:

> Protection of the copyright owner's economic interest is achieved in this case through an exceedingly narrow definition of the scope of fair use. The progress of arts and sciences and the robust public debate essential to an enlightened citizenry are ill served by this constricted reading of the fair use doctrine. See 17 U.S.C. § 107.

471 U.S. at 579 (1985).

Judge Brennan later noted in his dissenting opinion:

> The Court's reliance on the commercial nature of The Nation's use as "a separate factor that tends to weigh against a finding of fair use," *ante*, at 562, is inappropriate in the present context. Many uses § 107 lists as paradigmatic examples of fair use, including criticism, comment, and news reporting, are generally conducted for profit in this country, a fact of which Congress was obviously aware when it enacted § 107. To negate any argument favoring fair use based on news reporting or criticism because that reporting or criticism was published for profit is to render

meaningless the congressional imprimatur placed on such uses.

471 U.S. at 592 (1985).

The Petitioners respectfully submit that the Court of Appeals for the Second Circuit (the New York market), the Court of Appeals for the Ninth Circuit (the Los Angeles market), and the Court of Appeals for the Sixth Circuit (the Nashville market), because of the geographic concentration of the film, television, and music industries in these cities, play a far more significant role in determining precedent of copyright law than the other federal circuit courts. Therefore, the decision of the Court of Appeals for the Sixth Circuit in the case at bar will have a chilling and stifling effect on the creation and dissemination of commercial musical parodies, and other forms of parody and social criticism.

The majority opinion's restrictive holding in this case is inconsistent with previous rulings by both the Court of Appeals for the Second Circuit and the Court of Appeals for the Ninth Circuit, and effectively holds that commercial musical parody of a copyrighted work is a misappropriation of the copyrighted work.

Until the issuance of the decision below, the dominant forces in shaping the Fair Use Doctrine as it pertains to musical song parodies had been the Second and Ninth Circuit Courts of Appeal. These Courts, in a series of decisions including *Berlin v. EC Publications, Inc.*, 329 F.2d 541 (2nd Cir. 1964), *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986), and *Elsmere Music Inc. v. National Broadcasting Co.*, 623 F.2d 252 (2nd Cir. 1989), have for decades provided an interpretation of 17 U.S.C. § 107 which draws a careful distinction between the parody of a musical work and the mere piracy of that work for commercial gain. These decisions have been the benchmarks which guided composers and performers in this field.

With the decision below, in the third of the major "music circuits," these precedents are now challenged by a competing precedent which would effectively outlaw musical parody in nearly every circumstance. The importance which is likely to be placed on this recent and, in the Petitioners' view, manifestly incorrect precedent, is especially critical for two reasons: First, the Sixth Circuit has not previously spoken at all on the Fair Use Doctrine. The opinion below referred to this action as a "case of first impression" in this Circuit. Appendix A: App. p. 10a. Thus, if the decision below, which effectively outlaws commercial song parodies, remains law, there will be a sharp split among the three Circuits which for all intents and purposes control the music industry. Second, the opinion below relies heavily on this Court's recent decisions in *Harper & Row*, and *Sony*, and implies if it does not directly state that prior Second and Ninth Circuit precedent has been overruled by those recent Supreme Court opinions.

Was it the intention of this Honorable Court by its decisions in the *Sony* and *Harper & Row* cases to reverse prior Second and Ninth Circuit law regarding musical parody? If the answer to this question is in the affirmative, then this Court must also have intended – as will be shown below – to sharply curtail theatrical and literary criticism by commercial institutions, such as newspapers, and to generally restrict the permissible role of satire and criticism in the nation's intellectual life. However, a reading of the *Sony* and *Harper & Row* opinions strongly indicates that none of this was in the Court's mind when it issued those decisions, and that the ruling below is therefore simply misguided.

In *Sony Corp. v. Universal City Studios*, 464 U.S. 416, 104 S. Ct. 774 (1984), the owners of certain copyrights of television programs brought a copyright infringement action against certain manufacturers of home videotape recorders. The District Court for the Central District of California, 480 F. Supp. 429 (D.C. Cal. 1982), denied all relief sought by the copyright owners and entered

judgment for the manufacturers, and the copyright owners appealed. The Court of Appeals for the Ninth Circuit, 659 F.2d 963 (9th Cir. 1983), reversed the district court's judgment on copyright claim, and the manufacturers petitioned for writ of certiorari. The Supreme Court opinion by Justice Stevens said that "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owners of the copyright." 460 U.S. at 451. But the court went on to hold that the respondent manufacturers of home videotape recorders had demonstrated a significant likelihood that substantial numbers of copyright holders who licensed their work for broadcast on free television would not object to having their broadcasts time shifted by private viewers and that such time shifting had not been shown to cause any likelihood of harm to the potential market for, or the value of, their copyrighted works. The court therefore held that the "commercial use" presumption had been rebutted; that home videotape recorders were capable of substantial non-infringing uses; and thus, that the manufacturers' sale of such equipment to general public did not constitute contributory infringement of respondents' copyrights.

In *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985) former president Gerald Ford had contracted with Harper & Row Publishers, Inc. to publish his as yet unwritten memoirs. Harper & Row thereafter negotiated a licensing agreement with Time Magazine under which Time agreed to pay Harper & Row $25,000 in exchange for the right to excerpt 7,500 words from Mr. Ford's account of his pardon of former President Nixon. The Nation Magazine, a direct competitor of Time, in an effort to scoop Time, published an article which contained 300 to 400 words from President Ford's unpublished manuscript. Time canceled its article and refused to pay Harper & Row the balance of the agreed upon licensing fee. The District Court held that The Nation's publication of the verbatim unpublished work constituted a violation of the Copyright Act and did not constitute fair use. The

Court of Appeals for the Second Circuit reversed and held that The Nation's article did constitute fair use under 17 U.S.C. § 107. This Honorable Court reversed and held that The Nation's article did not constitute fair use.

Nation Enterprises in the *Harper & Row* decision asserted that the article that appeared in The Nation was a reporting of historical events and, therefore, constituted reasonable comment or criticism as permitted by the Fair Use Doctrine. In response, this Court acknowledged the historical importance of social criticism. The Court held that:

> As early as 1841, Justice Story gave judicial recognition to the doctrine in a case that concerned the letters of another former President, George Washington.
>
> "[A] reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purpose of fair and reasonable criticism. On the other hand, it is as clear, that if he thus cites the most important parts of the work, with a view, not to criticize, but to supersede the use of the original work, and substitute the review for it, such as use will be deemed in law a piracy." *Folsom v. Marsh*, 9 F.Cas. 342, 344-345 (No. 4,901) (CC Mass.)
>
> As Justice Story's hypothetical illustrates, the fair use doctrine has always precluded a use that "supersede(s) the use of the original."

Ibid. Accord, S. Rep. No. 94-473, p. 65 (1975) (hereinafter Senate Report).

471 U.S. at 550.

But on the facts of *Harper & Row*, this Court found that "The Nation's use had not merely the incidental effect but the intended purpose of supplanting the copyright holder's commercially valuable right of first publication." 471 U.S. at 562. This Court further acknowledged that:

> Our prior discussion establishes that the scope of fair use is narrower with respect to unpublished works. While even substantial quotations might qualify as fair use in a review of a published work or a news account of a speech that had been delivered to the public or disseminated to the press, see House Report, at 65, the author's right to control the first public appearance of his expression weighs against such use of the work before its release. The right of first publication encompasses not only the choice whether to publish at all, but also the choices of when, where, and in what form first to publish a work.

471 U.S. at 564.

In *Harper & Row*, 471 U.S. at 562, the Supreme Court cited the *Sony* case, stating that a commercial purpose merely "tends to weigh against a finding of fair use." The trial court in the case at bar, stated that "The defendant may rebut the presumption of commercial use as described in *Harper & Row* by convincing the court that the parody does not unfairly diminish the economic value of the original. *Fisher*, 794 F.2d at 437". Appendix B: App. p.

41a. By contrast, the majority opinion in the case at bar held:

> We agree that the commercial purpose is not itself controlling on the issue of fair use, but find that the District Court placed insignificant emphasis on the command of *Harper & Row*, wherein the Supreme Court expressly reaffirmed its earlier holdings that "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright." 741 U.S. at 562 (quoting *Sony Corp.*, 464 U.S. at 451).

Appendix A: App. pp. 12a-13a.

The *Sony* case involved verbatim copying of the copyrighted work. The *Harper & Row* case involved the news reporting of an unpublished manuscript by a direct competitor. In neither *Sony* nor *Harper & Row* did this Court examine the application of the Fair Use Doctrine concerning a creative derivative work such as a musical parody. The Court of Appeals has misapplied the commercial use presumption created by this Honorable Court in *Sony* and *Harper & Row* and imposed an unreasonable presumption against a finding of fair use for a commercially exploited creative derivative work. The granting of a writ of certiorari is therefore appropriate to consider the inconsistent precedent established by the Court of Appeals for the Sixth Circuit from that of the Court of Appeals for the Second Circuit and the Court of Appeals for the Ninth Circuit.

The determination of whether or not the Petitioners' musical parody of "Oh, Pretty Woman" constitutes fair use is a mixed question of law and fact for the Court, not a question of fact for the jury. *Fisher v. Dees*, 794 F.2d 432, 436 (9th Cir. 1986) The first

jurist who considered this mixed question of law and fact was the Honorable Thomas Wiseman, the trial judge. Judge Wiseman correctly found "That no genuine issue of material fact exists regarding the allegations of copyright infringement." Appendix B: App. p. 35a. The trial court correctly applied the four factors codified in 17 U.S.C. § 107 and found:

> . . . that they weigh in favor of the defendants. 2 Live Crew's 'Pretty Woman' is a parody. It's purpose is to poke fun at the original version of "Oh, Pretty Woman." In so doing, the parody copies from the original. Notwithstanding the copying needed to conjure up the original song, for the foregoing reasons the court concludes that 2 live Crew's use of the original copyrighted song is protected fair use.

Appendix B: App. p. 51a.

On appeal, a majority of the Court of Appeals for the Sixth Circuit reversed and remanded and stated in its conclusion that: "It is the blatantly commercial purpose of the derivative work that prevents this parody from being a fair use." Appendix A: App. p. 18a. The decision of the Court of Appeals for the Sixth Circuit was not unanimous. The Honorable David A. Nelson, Circuit Judge, wrote a strong dissenting opinion which concluded that the Petitioners' derivative work did constitute fair use. Judge Nelson adopted in part the trial court's reasoning and also noted the inconsistency of the majority opinion with precedents established by the Court of Appeals for the Second Circuit and the Court of Appeals for the Ninth Circuit on the same issue. Appendix A: App. pp. 19a-34a.

The fact is that all song parodies in this country have some commercial purpose. The sweeping majority opinion of the Court

of Appeals in the case at bar would effectively prohibit all forms of parody.

II.

WHETHER THE MAJORITY OPINION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRED IN HOLDING THAT THE "COMMERCIAL USE" PRESUMPTION ESTABLISHED BY THIS HONORABLE COURT IN *SONY CORP. V. UNIVERSAL CITY STUDIOS, INC.*, 464 U.S. 417 (1984), IS NOT GOVERNED BY RULE 301 OF THE FEDERAL RULES OF EVIDENCE.

The majority of the Court of Appeals for the Sixth Circuit, relying upon *Sony Corp. v. Universal City Studios*, 464 U.S. 416, 104 S. Ct. 774 (1984), argued that "Every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright. *Sony Corp. v. Universal City Studios*, 464 U.S. at 451" Appendix A: App. p. 13a.

The Court of Appeals for the Sixth Circuit majority opinion imposed a very restrictive presumption on the Petitioners' creative derivative work. The Sixth Circuit held that: "It is the blatantly commercial purpose of the derivative work that prevents this parody from being a fair use." Appendix A: App. p. 18a. It thus held that this "commercial use" presumption was sufficient to compel a finding that the Petitioners' parody adversely effected the market for and value of the copyrighted work. It reached this conclusion despite the fact that the only evidence of market impact was favorable to the Petitioners. Appendix D: App. pp. 70a-78a and Appendix F: App. pp. 89a-94a. This holding is inconsistent with the Federal Rules of Evidence. Rule 301 of the Federal Rules of Evidence provides:

> In all civil actions and proceedings not

> otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of non-persuasion, which remains throughout the trial upon the party on whom it was originally cast.

In *In re Yoder Company*, 758 F.2d 1114, 1119 (6th Cir. 1985), the Court of Appeals for the Sixth Circuit adopted the prevailing view that a rebuttable presumption under Rule 301 of the Federal Rules of Evidence is a "bursting bubble" and that if refuted the rebuttable presumption vanished and had no further probative effect. The majority decision of the Court of Appeals for the Sixth Circuit in the case at bar creates a far more restrictive and inflexible presumption than the "bursting bubble" approach. The Petitioners submit that no commercial parody can overcome the pronounced presumption created by the Court of Appeals for the Sixth Circuit and therefore no commercial parody can qualify as fair use under 17 U.S.C. § 107.

III.

WHETHER A CREATIVE DERIVATIVE WORK, SUCH AS A MUSICAL PARODY, DESPITE ITS COMMERCIAL PURPOSE, CAN BE AFFORDED PROTECTION UNDER 17 U.S.C. § 107 BECAUSE OF ITS IMPORTANCE AS A FORM OF SOCIAL CRITICISM.

The courts initially created Fair Use Doctrine to forcefully promote creative derivative works and social criticism. The judicially created doctrine of fair use was then later codified by Congress in 17 U.S.C. § 107. In codifying the concept of fair use,

Congress made clear that it in no way intended to depart from Court-created principles or to short-circuit further judicial development:

> The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis. Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.

H.R. No. 94-1476, 94th Cong., 2d Sess. 66 (1976) (House Report), reprinted in [1976] U.S.Code Cong. & Admin. News, pp. 5659, 5680 (referred to as USCCA). *See also*, Ren. Rep. No.473, 94th Cong. 1st Sess. 62 (1975) (Senate Report).

The trial court acknowledged that "At a minimum, courts have indicated that evaluation of these four factors is required. But they are not exclusive. *Harper & Row*, 471 U.S. at 560; *Pacific & Southern Co. v. Duncan*, 74 F.2d 1490, 1495 n.7 (11th Cir. 1984), *cert. denied*, 471 U.S. 104 (1985)." Appendix B: App. p. 39a. The Petitioners submit that in addition to the four codified factors, the trial court and Judge Nelson considered the creative nature of the Petitioners' derivative work and the importance of social criticism to American society. The majority opinion of the Sixth Circuit ignored these additional factors because of the "blatantly commercial nature" of the Petitioners' derivative work. Appendix A: App., p. 18a.

The Petitioners respectfully assert that the parodist is an important part of American culture. As stated by Judge Nelson in his dissenting opinion, a parody:

> . . . transforms as it copies, and it may well savage the original work in the process. In the past, at least copyright holders have not been overly enthusiastic about agreeing to see their works parodied — and the law itself has licensed parodists, much as the law has given license to book reviewers, drama critics, and other commentators. Ours is a commercial age, to be sure, and consensual "parody licenses" may be more common now than they used to be. I confess that I am still uneasy, however, about the prospect of the courts turning copyright holders into censors of parody. Neither the history of the fair use doctrine nor the four factors enumerated in the Copyright Act compel such a result. "[P]ermissible parody, whether or not in good taste, is the price an artist pays for success. . ." *BMCA, Inc. v. Wilson*, 677 F.2d 180, 191 (2d Cir. 1981) (Mansfield, J., dissenting).

Appendix A: App. p. 33a.

The political parody is deeply rooted in our nation's history. These creative derivative works have historically been commercially sold and performed. "Yankee Doodle"[3], "The Star

3. The origins of "Yankee Doodle" have been much debated by historians, but the most persuasive theory traces the song's beginnings to an English ditty, "Lucy Locket" (or "Fisher's Jig"). The "Yankee Doodle" lyrics were originally written (and the title supplied) by an English army surgeon as a comment on the

(Cont'd)

Spangled Banner"[4], and "America" ("My Country 'Tis of Thee")[5] are all political song parodies, with American words put to popular English ballads of the day. The use of political, musical parodies has continued throughout the history of this country, including

---

(Cont'd)
raftag character of colonial troops in the French and Indian War. But, during the Revolutionary War, the lyrics were rewritten, in numerous verses and variations, as an anti-British song. Most variant uses, like "The Battle of the Kegs," a "harmonious ditty" by Francis Hopkinson (a signer of the Declaration of Independence) addressed specific current events — in that case a botched plan to blow up English ships in Philadelphia harbor. See Howard, John Tasker *Our American Music: A Comprehensive History From 1620 to the Present*, Crowell (1965), pp. 37, 113-118; See also, Even, David, *Great Men of American Popular Song*, Prentice Hall (1970), p. 6.

4. The "Star Spangled Banner" began, circa 1775, as the marching song of London's Anacreontic Society, "To Anecreon in Heaven." Originally, the song was an ode to love and wine, with each stanza ending "And besides I'll instruct yes, like me, to intwine/ The myrtle of Venus with Bacchus's vine." The first American parody of the song was published in New York in 1793 ("The genius of France from his star begem'd throne"), but the song soon thereafter became a vehicle for patriotic theses, such as "Sons of Columbia," "For the Glorious Fourth of July," "Union of the Gods," and "Freedom." The parody, "Adams and Liberty," helpted boost the Federalist cause, while a few years later "Jefferson and Liberty" boosted the rival party. In the War of 1812, the melody was first used for "The Battle of the Wabash," and — as we know it today — in Francis Scott Key's "Defense of Fort McHenry." Howard, John Tasker *Our American Music: A Comprehensive History From 1620 to the Present, op. cit.*, pp. 121-126.

5. "America" began with "Sally in My Alley," an english tavern song. An early suffragette adopted to it a poem entitled "Rights of Woman." The resulting song began, "God save each female's right / Show to her ravish'd sight / Woman is free." Shortly thereafter, the melody produced the English patriotic standard, "God Save the King." In 1831, Samule Francis Smith used it for "America." *Id.* pp. 126-128.

recent commercial radio station parodies of the 1991 Gulf War[6].

Today, scores of companies, groups, and individuals write, perform, and record political parody songs of copyrighted material. These range from the cast of Saturday Night Live [*see Elsmere Music Co., Inc. v. National Broadcasting Co.*, 482 F. Supp. 741 (S.D.N.Y.), *aff'd*, 623 F.2d 252 (2d Cir. 1980)], to lesser known local groups which charge for admission, and/or sell audio tapes of their performances.[7] Few, if any, of these groups and individuals seek or obtain permission for their parodies. Further, it is highly unlikely that the copyright owners would grant permission if requested. In the case at bar the Petitioners did seek permission from the Respondent which was refused. Appendix E: Exhibits A & B, App. pp. 83a-85a. The Petitioners respectfully assert that the presumption created by the majority decision of the Court of Appeals for the Sixth Circuit implies that no parody for commercial exploitation could survive and be declared a fair use of the original copyrighted work.

---

6. In the first two months after Iraq's invasion of Kuwait, more than a dozen parodies appeared on the airwaves, including "Hussein is Crazy" (to "She Drives Me Crazy"), "Iraqity-Rag" (to "Yackety-Yak"), "Iraq and a Hard Place" (to "A Rock and a Hard Place"), and "Iraqi Blues" (to "Summertime Blues"). All of these songs were written and produced by disk jockeys at commercial radio stations, and given airtime on those stations alongside commercial songs. Baltimore Sun, "Song Parodists Aim Poison-Pen at Iraq," August 23, 1990.

7. These include Minnesota Public Radio's "Prairie Home Companion,," and "American Radio Theatre," Oregon's "Summer Angels," the "Bushwhackers" of Oberlin College, Ohio, the Wisconsin Sierra Club, the "Last Chance Dixieland Jazz Bank" of Helena, Montana, and Washington, D.C.'s "Hexagon," and "Mrs. Foggybottom and Her Friends."

IV.

WHETHER A COPYRIGHT HOLDER HAS A PROTECTED INTEREST IN THE POTENTIAL MARKET FOR PARODIES OF HIS ORIGINAL WORK, EVEN IF THE ORIGINAL WORK DOES NOT COMPETE WITH ANY EXISTING PARODY OF THE ORIGINAL WORK.

The Respondent, as a last resort to convince the trial court and the Court of Appeals for the Sixth Circuit that the Petitioners' parody had an effect on the market of its original work, inconsistently argued that the Petitioners' parody precluded the Respondent from developing its own parody of its own original work. The Respondent had no reasonable expectation of developing a parody which criticized and mocked this time-honored rock-n-roll ballad. Amazingly, the Court of Appeals accepted this argument. Appendix A: App. pp. 16a-17a. If this Court accepts this fabricated argument of the Respondent then no parody, commercial or otherwise, would ever be permitted under the Fair Use Doctrine. According to the Respondent, to defeat a parodist's argument of fair use, a copyright owner would then simply have to make the bold assertion of its intent at some undetermined date in the future to release a parody of its own original work.

The Respondent, as evident by the allegations of its Complaint made it quite clear it had no intent to compete with the Petitioners' parody. The Respondent alleged that: "Requests for licenses that either are not consistent with good taste or would disparage the future value of the copyright are denied." Appendix C: App. p. 59a. The Respondent further stated in the Complaint that "The unauthorized new lyrics created by Defendants for 'Pretty Woman' are disparaging and therefore not consistent with maintaining the value of the copyright in 'Oh, Pretty Woman.'" Appendix C: App. pp. 60a-61a.

The trial court questioned the Respondent's concern and noted in a footnote that:

> It is unclear exactly what Acuff-Rose means when it complains in it response to the Motion for Summary Judgment that the parody "dirt[ies]" the copyright. 2 Live Crew's version is neither obscene nor pornographic. Even if the work included pornographic references, that does not necessarily preclude a finding of fair use. *Pillsbury Co. v. Milky Way Productions, Inc.*, 215 U.S.P.Q. 124, 131 (N.D.Ga. 1981).

Appendix B: App. p. 42a, n. 4.

It is evident from the Respondent's allegations as set forth in the Complaint that it would never release a competing parody of its original work similar to that of Petitioners' parody. A parody, by its very nature, is critical and mocks the original work. Quite often, the author of the original work finds the parody offensive.

In *Pillsbury Co. v. Milky Way Productions, Inc.*, 215 U.S.P.Q. 124, 131 (D.C.N.Ga. 1981), the District Court held that Screw magazine's use of the Pillsbury Company's trademark, the Popin' Fresh Doughboy, constituted fair use. The court held that:

> Although the portrayal is offensive to the court, the court has no doubt that Milky Way intended to make an editorial comment on the values epitomized by these trade characters. The fact that Screw magazine is offered for sale does not compel a contrary conclusion. Social commentary placed in a newspaper or magazine is not put to a commercial use simply

> because the publication is sold rather than given to the public. The presentation was located on the inside of the magazine, not on the cover where it might be taken more reasonably as an attempt to capitalize on the plaintiff's original work.
>
> The plaintiff suggests that, in addressing this factor, the court should consider the generally salacious content of Screw magazine. The plaintiff seems to believe that a pornographic adaptation of copyrighted works should be accorded less protection under the fair use doctrine than what might otherwise be granted a more continent presentation. The Copyright Act, however, does not expressly exclude pornographic materials from the parameters of the fair use defense, and the plaintiff offers no authority for this protection. The character of the unauthorized use is relevant, but, in the court's judgment, the fact that this use is pornographic in nature does not militate against a finding of fair use.

In *University of Notre Dame v. Twentieth Century-Fox*, 256 N.Y.S. 2d 301, 307 (1965), the Supreme Court of New York held:

> "What seems to one to be trash may have for others fleeting or even enduring values" (Hannegan v. Esquire, Inc., 327 U.S. 146, 158, 66 S.Ct. 456, 462, 90 L.Ed. 586). "everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine" (Winters v. People of State of New York, 333 U.S. 507, 510, 68 S.Ct. 665,

667, 92 L.Ed. 840). Accordingly, as intimated at the outset, we may not import the role of literary or dramatic critic into our functioning as judges in this case; and so for purposes of the law we may not reach a conclusion that the works of fiction involved in this litigation are not artistic or literary works. Whether they are creations of merit, whether they have value only as entertainment and no value whatever as opinion, information or education, pose questions which would require us to stake out those elusive lines that we have been warned not to attempt in the cases above cited (see also Molony v. Boy Comics Publishers, 227 App.Div. 116, 171, 98 N.Y.S.2d 119, 123, Van Voorhis, J.). Whether "John Goldfarb, Please Come Home" is a good burlesque or bad, penetrating satire or blundering buffoonery, is not for us to decide. It is fundamental that courts may not muffle expression by passing judgment on its skill or clumsiness, its sensitivity or coarseness; nor on whether it pains or pleases. It is enough that the work is a form of expression "deserving of substantial freedom - both as entertainment and as a form of social and literary criticism" (Berlin v. E.C. Publications, Inc., 2 Cir., 329 F.2d 541, 545, cert. den., 379 U.S. 822, 85 S.Ct. 46, 13 L.Ed.2d 33); and we are not prepared to hold that exercise of the freedom in the instant circumstances infringes on rights which equity should protect.

In *Fisher v. Dees*, 794 F.2d 432, 437 (9th Cir. 1986), the Ninth Circuit discussed the fact that very often a parody was critical of the original work. The Court specifically held:

In assessing the economic effect of the parody, the parody's critical impact must be excluded. Through its critical function, a "parody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically." B. Kaplan, *An Unhurried View of Copyright* 69 (1967). Copyright law is not designed to stifle critics. "'Destructive' parodies play an important role in social and literacy criticism and thus merit protection even though they may discourage or discredit an original author." *Parody Defense*, 96 Harv.L.Rev. at 1411. Accordingly, the economic effect of a parody with which we are concerned is not its potential to destroy or diminish the market for the original – any bad review can have that effect – but rather whether it fulfills the demand for the original. Biting criticism suppresses demand; copyright infringement usurps it. Thus, infringement occurs when a parody supplants the original in markets the original is aimed at, or in which the original is, or has reasonable potential to become, commercially valuable. *See, e.g., Air Pirates*, 581 F.2d at 756; *Berlin v. E. C. Publications, Inc.*, 329 F.2d 541, 545 (2d Cir.), *cert. denied*, 379 U.S. 822, 85 S.Ct. 46, 13 L.Ed.2d 33 (1964); *Parody Defense, supra*, at 1409-11.

The Petitioners respectfully assert, as supported by the affidavits of their expert witnesses, that the parody and the copyrighted work do not compete. Although the Respondent's version is for commercial gain, the sale of the Petitioners' version will not, in any way, reduce the economic value of the Respondent's work. Mr. Brand states:

> There is no question in my mind that the song "Oh, Pretty Woman" by Roy Orbison and William Dees was intended for Mr. Orbison's country music audience and middle-America.
>
> On the other hand, 2 Live Crew's version, which is unquestionably a comic parody, is aimed at the large black populace which used to buy what was once called "race" records. The group's popularity is intense among the disaffected, definitely not the audience for the Orbison song. I cannot see how it can affect the sales or popularity of the Orbison song, except to stimulate interest in the original.

Appendix D: App. pp. 75a. This conclusion is also confirmed by Mr. Krasilovsky who states that "In other words, the record collector seeking the original composition would be highly unlikely to purchase or tune into the 2 Live Crew version." Appendix F: App. p. 91a.

In *Hill v. Whalen*, 220 F. 359, 360 (S.D.N.Y. 1914), the Court held that:

> One test which, when applicable, would seem to be ordinarily decisive, is whether or not so much has been reproduced as will materially reduce the demand for the original. If it has, the rights of the owner of the copyright have been injuriously affected. A word of explanation will be here necessary. The reduction in demand, to be a ground of complaint, must result from the partial satisfaction of that demand by the alleged infringing production. A criticism of the original work, which

> lessened its money value by showing that it was not worth seeing or hearing, could not give any right of action for infringement of copyright.

In *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1966), the Court held:

> Whether an author or publisher reaps economic benefits from the sale of a biographical work, or whether its publication is motivated in part by a desire for commercial gain, or whether it is designed for the popular market, *i.e.*, the average citizen rather than the college professor, has no bearing on whether a public benefit may be derived from such a work. Moreover, the district court in emphasizing the commercial aspects of the Hughes biography failed to recognize that "[a]ll publications presumably are operated for profit * * *." *Koussevitzky v. Allen, Towne & Health*, 188 Misc. 479, 483, 68 N.Y.S.2d 779, 783, aff'd, 272 App.Div. 759, 69 N.Y.S.2d 432 (1st Dept. 1947), and that "both commercial and artistic elements are involved in almost every [work] * * *" Note, 56 Colum. L. Rev. supra at 597. Thus, we conclude that whether an author or publisher has a commercial motive or writes in a popular styled is irrelevant to a determination of whether a particular use of copyrighted material in a work which offers some benefit to the public constitutes a fair use. *Cf. Koussevitzky v. Allen, Towne & Health*, 68 N.Y.S.2d supra, 782-784 (construing N.Y. Civil Rights Law, McKinney's Consol. Laws, c. 6, section 51).

The trial court concluded:

> With respect to the parody "Pretty Woman," this fourth factor favors the defendants. As in *Fisher,* it is extremely unlikely that 2 Live Crew's song could adversely affect the market for the original. The intended audience for the two songs is entirely different. The odds of a record collector seeking the original composition who would also purchase the 2 Live Crew version are remote. Defendants' Affidavit of William Krasilovsky. "The group's popularity is intense among the disaffected, definitely not the audience for the Orbison song. I cannot see how it can affect the sales or popularity of the Orbison song, except to stimulate interest in the original." Defendant's Affidavit of Oscar Brand. Second, while Acuff-Rose is not required to prove damages, *Marcus v. Rowley,* 695 F.2d 1171, 1177 (9th Cir. 1983), it has not produced convincing evidence that any harm to any existing or potential market has occurred. *Cf. Harper & Row,* 471 U.S. at 567 (where trial court found an actual effect on the market). On a motion for summary judgment, the nonmoving party cannot rest on its pleadings, but must present some "specific facts showing that there is a genuine issue for trial." *Celotex Corp.*, 477 U.S. at 324. Acuff-Rose must adduce more than a scintilla of evidence to overcome the motion. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989).

Appendix B: App. pp. 49a-50a.

Judge Nelson, in his dissent, relying on Oscar Brand's affidavit as to the effect of the parody on the market for the original work, stated that "Brand's analysis of the market stands unrefuted." Appendix B: App. p. 32a.

CONCLUSION

The Petitioners respectfully assert that no presumption against a finding of fair use is applicable to a creative derivative work, such as a musical parody. The Petitioners respectfully assert that if a presumption exists precluding fair use of a commercially exploited musical parody, then such presumption is rebuttable as provided by Rule 301 of the Federal Rules of Civil Procedure. The Petitioners respectfully assert that the presumption created by the majority opinion of the Court of Appeals for the Sixth Circuit in the case at bar is far too strong and inflexible and is inconsistent with decisions of both the Court of Appeals for the Second Circuit and the Court of Appeals for the Ninth Circuit. Lastly, the author of an original work cannot fabricate a potential market for parodies of its original work then use that fabricated market to suppress parodies it finds offensive.

Respectfully submitted,

ALAN MARK TURK
Attorney for Petitioners
200 Fourth Avenue, North
Eighth Floor
Nashville, TN 37219
(615) 726-2999

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED AUGUST 17, 1992

No. 91-6225

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ACUFF-ROSE MUSIC, INC.,
Plaintiff-Appellant,

v.

LUTHER R. CAMPBELL, a/k/a LUKE SKYYWALKER; CHRISTOPHER WONGWON, a/k/a FRESH KID ICE; MARK ROSS, a/k/a BROTHER MARQUIS; DAVID HOBBS, a/k/a MR. MIXX; professionally known as 2 LIVE CREW; LUKE SKYYWALKER RECORDS,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Middle District of Tennessee

---

Decided and Filed August 17, 1992

Before: NELSON and NORRIS, Circuit Judges; and JOINER, Senior District Judge.*

---

*Honorable Charles W. Joiner, United States District Court for the Eastern District of Michigan, sitting by designation.

JOINER, Senior District Judge, delivered the opinion of the court, in which NORRIS, Circuit Judge, joined. NELSON, Circuit Judge (pp. 19-34), delivered a separate dissenting opinion.

CHARLES W. JOINER, Senior District Judge. In this copyright case, plaintiff appeals summary judgment granted to defendants. The district court held that defendants' use of a song owned by plaintiff was a parody and therefore constituted a fair use of copyrighted material under section 107 of the Copyright Act, 17 U.S.C. § 101 *et seq.*

The 2 Live Crew, a rap music group, released for commercial distribution a version of Acuff-Rose Music's copyrighted song, "Oh, Pretty Woman." Acuff-Rose sued The 2 Live Crew, its individual members and its record company for copyright infringement and alleged pendent state law claims of interference with business relations and interference with prospective business advantage. Defendants filed a motion for dismissal, which was treated as a motion for summary judgment. The district court granted summary judgment, holding that The 2 Live Crew had created a parody and that the parody was a non-infringing "fair use" of the song as defined by section 107 of the 1976 Copyright Act. 17 U.S.C. § 107. We reverse.

I.

"Oh, Pretty Woman" was written and recorded by Roy Orbison and William Dees in 1964. Rights to the song were assigned to Acuff-Rose that same year, and Acuff-Rose registered for copyright protection. The song has become a pop music standard, and Acuff-Rose has realized substantial income from the licensing of "cover" recordings and other derivative works.

Luther Campbell, lead vocalist and song writer of The 2 Live Crew (2 Live Crew), wrote a version of "Oh, Pretty Woman" in May 1989, which he entitled "Pretty

Woman." By affidavit, Campbell stated that he had intended to create a parody as an attempt "through comical lyrics, to satirize the original work . . . ." In June 1989, Campbell's company, Luke Records (then doing business as Skyywalker Records), released "Pretty Woman" as one of ten tracks on a collection entitled "As Clean As They Wanna Be." The credits on the album[1] recognize Orbison and Dees as the writers of "Pretty Woman," and Acuff-Rose as publisher of the song.

On July 5, 1989, following release of the album, Linda Fine, general manager of Luke Records, wrote a letter to Gerald Tiefer of Opryland Music Group (of which Acuff-Rose is a part) to "inform [Tiefer] of 'Two Live Crew's' desire to do a parody" of "Oh, Pretty Woman."[2] Fine stressed that a parody was intended and that the popularity of 2 Live Crew ensured substantial sales:

> At the time of this writing the Group has a cut on the Billboard Rap Chart. I have enclosed a copy of the lyrics, so that you may see their satirical parody, very similar in vain [sic] to what Weird Al Yankovic and other satirical artists are doing.
>
> We intend that all credits (writer & publisher) show your complete ownership of the song, and of course we intend to pay statutory rates.

---

[1]We use the term "album" generically; "As Clean As They Wanna Be" was also released on compact disc and cassette tape.

[2]The parties dispute the above chronology. Defendants contend that Campbell intended all along to create a comic song and appropriately sought the permission of Acuff-Rose prior to doing so. Acuff-Rose sees Fine's letter as a effort to create a revisionist history of legitimacy for an act of piracy. The district court found that "As Clean As They Wanna Be" was released on July 15, 1989, subsequent to Fine's letter to Tiefer. Campbell's intent is not dispositive of the case, but we note that this finding contradicts Campbell's affidavit. The only support in the record for a July 15 release date is found in Acuff-Rose's response to the motion for dismissal, in which counsel asserted a release date "on or about July 15, 1989." Campbell's affidavit is a better factual source than counsel's contention.

Appendix A

> Kindly keep in mind that we present this to you in a humorous sense and in no way should this be construed as anything but a novelty record that will be heard by hundreds of thousands of new listeners in their homes.

Fine included a cassette tape of 2 Live Crew's version of the song and a lyric sheet for Tiefer to consider.

Tiefer responded tersely: "I am aware of the success enjoyed by 'The 2 Live Crews', but I must inform you that we cannot permit the use of a parody of 'Oh, Pretty Woman.'" This refusal to grant a license did not dissuade 2 Live Crew from continuing to sell "As Clean As They Wanna Be."

Acuff-Rose brought suit in June 1990 and defendants responded by filing a motion to dismiss, accompanied by affidavits, and sought to deposit $13,867.56. This amount was apparently calculated after reference to statutory royalty rates established by the Copyright Act, and reflected defendants' understanding of what was owed to Acuff-Rose for use of the copyrighted song. The district court ordered the funds deposited with the Clerk of Court.[3] Acuff-Rose responded with affidavits, which the district court relied upon when granting summary judgment.

---

[3]At oral argument, counsel for 2 Live Crew stated that the deposit was a tactical mistake which should not be construed as an admission that the group's song was something other than a fair use parody. Our review of the record reveals confusion over the status of "Pretty Woman" as either a "comic" effort, such as those created by comic musician Weird Al Yankovic, or a "parody," which purports to deliver social commentary within a humorous framework. Yankovic's works are licensed uses, not "fair uses" for which a license is not required. This confusion on the part of 2 Live Crew adds weight to Acuff-Rose's assertion that Campbell's intent to create a parody was only formed after "Pretty Woman" was released.

Appendix A

Among the affidavits presented, defendants presented that of Oscar Brand.[4] Brand, who has himself recorded a number of songs which he terms "parodies," stated his opinion that "both the words and the music of the 2 Live Crew performance are classic parodies." Brand dissected the two songs and found substantial similarities of musical structure between them. The 2 Live Crew version has the same 4/4 drum beat as the original and includes a "very recognizable 'bass riff,'" which "is repeated *eight times* . . . ." However, the 2 Live Crew version diverges from the original by following the recognizable riff with "an atypical scraper – a Latin musical device, quite antithetic to the Orbison musical styling." Further, in the 2 Live Crew version, the lead vocalist sings (or raps) "in the key of B major, which, performed against the A major chorus, gives the song a comic aspect."

Lyrically, Brand found "Pretty Woman" to be consistent with a long tradition in the United States of making social commentary through music. African-American rap music, Brand stated, uses parody as a form of protest, and often substitutes new words to "make fun of the 'white-bread' originals and the establishment . . . ." In "Pretty Woman," Brand concluded, "this anti-establishment singing group is trying to show how bland and banal the Orbison song seems to them. It's just one of many examples of their derisive approach to 'white-centered' popular music."

Acuff-Rose presented the affidavit of Ph.D. musicologist Earl V. Speilman. Speilman also examined and compared the two songs and determined that there is "a significant amount of similarity" between them. Speilman identified five specific similarities, including the repetition of the recognizable riff, which "may have actually been sampled or lifted and then incorporated into the recording of 'Pretty Woman' as performed by The 2

---

[4]2 Live Crew also presented the affidavit of M. William Krasilovsky, whose conclusions and the reasons therefore are much the same as Brand's.

Live Crew." Speilman concluded that even a listener without musical training would readily discern that "Pretty Woman" was modelled after "Oh, Pretty Woman."

The district court determined that there were no genuine issues of fact material to the question of fair use in dispute, and that the case was therefore suitable for summary judgment. *Acuff-Rose Music, Inc. v. Campbell*, 754 F. Supp. 1150, 1153 (M.D. Tenn. 1991). The court then analyzed the factors by which an alleged infringing use is tested for fairness under section 107 of the Act. *Id.* at 1154-59.[5]

Following the district court's determination that "Pretty Woman" was a parody, Acuff-Rose filed motions to distribute the funds deposited by 2 Live Crew with the Clerk of Court, and sought reconsideration of the fair use determination by introducing additional evidence on the question of the impact of the parody upon the market value of the copyrighted original.[6] Based upon its determination of fair use, the district court granted summary judgment and ordered the funds returned to 2 Live Crew.

II.

We review the district court's grant of summary judgment *de novo*. *EEOC v. University of Detroit*, 904 F.2d 331, 334 (6th Cir. 1990). Summary judgment is appropriate if the non-moving party fails to establish a genuine issue of material fact on an element essential to its case and on which it would bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322

[5]The district court also determined that Acuff-Rose's pendent state law claims were preempted by section 301 of the Copyright Act. *Acuff-Rose Music*, 754 F. Supp. at 1159-60. Acuff-Rose does not challenge this determination.

[6]Acuff-Rose also sought leave to amend its complaint to allege violations of the Lanham Act. 15 U.S.C. § 1125(a). The district court denied the motion and Acuff-Rose does not allege error in the denial.

(1986). In making that determination, we view the evidence in the record in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

These general principles apply to the question of fair use, *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1257-58 (2d Cir. 1986), *cert. denied*, 481 U.S. 1059 (1987), which is a mixed question of law and fact. *Matthews Conveyor Co. v. Palmer Bee Co.*, 135 F.2d 73, 85 (6th Cir. 1943); *Harper & Row Publishers v. Nation Enter.*, 471 U.S. 539, 560 (1985). In reviewing the district court's determination of fair use, when that court has found facts sufficient to evaluate each of the factors enumerated in section 107 of the Copyright Act, we "'need not remand for further factfinding . . . [but] may conclude as a matter of law that [the challenged use] do[es] not qualify as a fair use of the copyrighted work.'" *Harper & Row*, 471 U.S. at 560 (quoting *Pacific & S. Co. v. Duncan*, 744 F.2d 1490, 1495 (11th Cir. 1984)). Our review of the record shows that no material facts are in dispute. The parties dispute the ultimate conclusions to be drawn from the facts. These judgments are legal in nature.

III.

Section 102(a) of the Copyright Act, adopted under the express authority of Section 8 of the United States Constitution granting Congress the power to give authors exclusive rights to their writings, protects "musical works, including any accompanying words." 17 U.S.C. § 102(a)(2). Section 106 of the Act grants to the copyright holder a variety of exclusive rights in the copyrighted work, including the right to "reproduce the copyrighted work in copies or phonorecords," and to "prepare derivative works based upon the copyrighted work." 17 U.S.C. § 106(1) and (2). The words and music to plaintiff's song "Oh Pretty Woman" are subject to these protections. However, plaintiff's exclusive rights are also subject to the provisions of sections 107 through

118 of the Act, which create exemptions and limitations on the owner's rights.

Section 107 of the Copyright Act states:

> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include –
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107. In this case 2 Live Crew defends against a charge of copyright infringement by arguing that "Pretty Woman" falls within the exceptions spelled out in section 107.

In determining the scope and extent of the exceptions and limitations to copyright protection carved out by section 107, it is important to focus on the plain language of that section and the directions implicit in its form.

Section 107 takes from a copyright owner the exclusive rights to his work insofar as a derivative, or allegedly infringing work, is a "fair use" of the copyrighted work. Traditionally, fair use is defined as "'a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent.'" *Harper & Row*, 471 U.S. at 549 (quoting H. Ball, *Law of Copyright and Literary Property*, 260 (1944)). Fair use is an "equitable rule of reason," *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 448 (1984), which is used in order to "avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." *Stewart v. Abend*, 495 U.S. 207, 236 (1990) (quoting *Iowa State Univ. Research Found., Inc. v. American Broadcasting Cos.*, 621 F.2d 57, 60 (2d Cir 1980)). Fair use is the only exception to a copyright holder's exclusive rights in his work, but section 107 explains that the overarching concept of fair use embraces use of a copyrighted work for the purpose of "criticism, comment, news reporting, teaching, scholarship, or research."

As the jurisprudence of section 107 has developed, the courts have found that the section's recognition of "comment" and "criticism" as species of fair use also, by practical extension of those terms, includes the use of a copyrighted work (or a portion thereof) as a parody or satire of that work. *Rogers v. Koons*, 960 F.2d 301, 309 (2d Cir. 1992). Indeed, the fair use formulation found in section 107 is a reflection of Congress's intent to codify the common law fair use doctrine,[7] which has long included parody. *Harper & Row*, 471 U.S. at 549; see also *Bloom & Hamlin v. Nixon*, 125 F. 977 (C.C.E.D. Pa. 1903) (a parody fair use involving vaudeville impersonations). Therefore, it is understandable that both the parties and the district court focus on parody in their analyses of fair use. However, because the text of section 107 lists specific fair uses, we find that the term parody

---

[7] *See* S. Rep. No. 94-473, 94th Cong., 1st Sess. at 61-62 (1975); H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. at 65 (1976).

must be either subsumed within the statutory terms "criticism" or "comment," or be an entirely separate category of exception.

Unfortunately, the terminology of the fair use analysis has evolved in such a way that the popular definition of parody and the statutory definition of parody as a form of criticism have become somewhat confused. Popularly, the term parody may be described as "when one artist, for comic effect or social commentary, closely imitates the style of another artist and in so doing creates a new artwork that makes ridiculous the style and expression of the original." *Rogers*, 960 F.2d at 309-10. This popular definition has been used on occasion as a synonym for that which is necessary to create an exception to the exclusive rights in a copyrighted work. This use, we find, creates confusion and should be avoided. Much of entertainment involves parodies in the popular sense, but section 107 does not direct the courts to conclude that all such parodies are fair uses. For the purposes of this opinion, we will assume, as found by the district court, that 2 Live Crew's song is a parody of Acuff-Rose's copyrighted song, and proceed to determine whether the calculus of section 107 results in a determination of fair use. That determination requires careful application of the four statutory factors. *Harper & Row*, 471 U.S. at 549; 3 M. Nimmer, *Nimmer on Copyright*, § 13.05[A] at 13-82.1. Although the question of fair use in the context of musical works is one of first impression in this circuit, we do not write on a clean slate.

Purpose and Character of Use

We look first to the purpose and character of the use of Acuff-Rose's song by 2 Live Crew. We accept the district court's conclusion that the purpose of the use was to parody the original.[8] We consider the character of the

[8]We do so with considerable reservation, as the district court's parody analysis does not, in our view, comport with proper analysis of that term.

The district court compared the statement of the parties' affiants and concluded: "Acuff-Rose may not like it, and 2 Live Crew may not have created the best parody of the original, but nonetheless the facts convincingly demonstrate that it is a parody." *Acuff Rose*, 754 F. Supp. at 1155. The district court closely parsed the lyrics of the two songs, finding that: "Although the parody starts out with the same lyrics as the original, it quickly degenerates into a play on words, substituting predictable lyrics with shocking ones." *Id.* 2 Live Crew contends that by way of the "shocking" lyrics "Pretty Woman" was intended to satirize the original work, as well as society at large. Our difficulty with the district court's conclusion that this intention was realized is that, even accepting that "Pretty Woman" is a comment on the banality of white-centered popular music, we cannot discern any parody of the original song. Failing a direct comment on the original, there can be no parody, as the "copied work must be, at least in part, an object of the parody, otherwise there would be no need to conjure up the original work." *Rogers*, 960 F.2d at 310 (citing *MCA, Inc.*, 677 F.2d at 185).

In the copyrighted song, the singer remarks on the beauty of a woman he sees on the street. The singer is initially disappointed when the woman rebuffs his advances and later exults when the woman appears to change her mind. Campbell's lyrics involved women but aside from broadly evoking the theme of the original in the opening line of the 2 Live Crew version: "Pretty Woman – Walkin' down the street, Pretty Woman – Girl you look so sweet," bear no discernible relationship to the original. Instead, as Brand noted, the lyrics examine a series of women with unappealing attributes: "Big Hairy Woman – You need to shave that stuff, Big Hairy Woman – You know I bet it's tough, Big Hairy Woman – All that hair it ain't legit, 'Cause you look like 'cousin it,' Big Hairy Woman," or who are not faithful: "Two Timin' Woman – Girl you know you ain't right, Two Timin' Woman – You's out with my boy last night, Two Timin' Woman – That takes a load off my mind, Two Timin' Woman – Now I know the baby ain't mine."

In our opinion, this is not a new work which makes ridiculous the style and expression of the original, although there is plainly an element of the ridiculous to the new work. We cannot see any thematic relationship between the copyrighted song and the alleged parody. The mere fact that both songs have a woman as their central theme is too tenuous a connection to be viewed as critical comment on the original. We find instructive the holding in *Elsmere v. National Broadcasting Co.*, 482 F. Supp. 741 (S.D.N.Y. 1980), *aff'd per curiam*, 623 F.2d 252 (2d Cir. 1980). The Court of Appeals for the Second Circuit agreed with the district court that the company of the television program "Saturday Night Live" had performed a parody – entitled "I Love Sodom" – of the then-widely known advertising jingle "I Love New York." The new work cast the original image-polishing effort as ridiculous by asserting that the effort to redeem New York City's image was futile. It is this sort of direct comment, comment which is expressly and unambiguously directed at the message of the original work, which constitutes a parody. Similarly, the court in *Rogers* found that a sculpture based upon a copyrighted

use separately. The use of a copyrighted work primarily for commercial purposes has been held by the Supreme Court to be presumptively unfair. *Sony Corp.*, 464 U.S. 417, 449 (1984). "While commercial motivation and fair use can exist side by side, the court may consider whether the alleged infringing use was primarily for public benefit or for private commercial gain." *MCA, Inc. v. Wilson*, 677 F.2d 180, 182 (2d Cir. 1981). The Supreme Court explained that "[t]he crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain, but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price." *Harper & Row*, 471 U.S. at 562.

In the instant case, the district court found, and we agree, that "2 Live Crew's song is included on a commercially distributed album sold for the purpose of making a profit," and that "2 Live Crew's primary goal in releasing 'As Clean As They Wanna Be' is to sell its music . . . ." 754 F. Supp. at 1154. However, the district court saw the Supreme Court's holdings in *Sony Corp.* and *Harper & Row* regarding the presumptively unfair nature of a commercial purpose as "merely 'tend[ing] to weigh against a finding of fair use.'" *Id.* (quoting *Harper & Row*, 471 U.S. at 562). We agree that commercial purpose is not itself controlling on the issue of fair use, but find that the district court placed insufficient emphasis on the command of *Harper & Row*, wherein the Supreme Court expressly reaffirmed its earlier holding that "'[E]very commercial use of copyrighted material is presumptively an unfair

---

photograph was not a parody regardless of the creator's alleged intention to point out the banality of the copyrighted work. *Rogers*, 960 F.2d at 309-10. The new work, the court found, could perhaps be seen as a critique of materialistic society at large, but on its face the sculpture failed to make critical comment regarding the original creative work. *Id.* We are in agreement with the *Rogers* court that the term parody cannot be allowed to assume too broad a definition, for if an "infringement of a copyrightable expression could be justified as a fair use solely on the basis of the infringer's claim to a higher or different artistic use . . . there would be no practicable boundary to the fair use defense." *Id.* at 310.

exploitation of the monopoly privilege that belongs to the owner of the copyright.'" 471 U.S. at 562 (quoting *Sony Corp.*, 464 U.S. at 451). Therefore, in analyzing the purpose and character of 2 Live Crew's use of the copyrighted song, the facts in the record require that we start from the position that the use is unfair. We are asked to then consider whether 2 Live Crew met its burden to rebut the presumption by a defense, we note, requiring the court to be convinced that the "parody does not unfairly diminish the economic value of the original." *Fisher v. Dees*, 794 F.2d 432, 437 (9th Cir. 1986).

Although in this case we do not set aside the district court's conclusion that 2 Live Crew's song is a criticism in the nature of a parody in the popular sense, we nevertheless find that the district court erred in the process of determining that the criticism constituted a fair use of the copyrighted work. We find that the admittedly commercial nature of the derivative work -- the *purpose* of the work being no less important than its *character* in the Act's formulation -- requires the conclusion that the first factor weighs against a finding of fair use. *Sony Corp.*, 464 U.S. at 449.

Nature of Copyrighted Work

The district court found that this factor weighed against a determination of fair use, and we agree. *Acuff-Rose*, 754 F. Supp at 1155-56. As a general rule, creative works -- literary works of fiction or artistic works -- are afforded greater protection from the fair use determination than are works of fact. *Harper & Row*, 471 U.S. at 563; *New Era Publications, Int'l v. Carol Publishing Group*, 904 F.2d 152, 157 (2d Cir.), *cert. denied*, ___ U.S. ___, 111 S. Ct. 297 (1990). The status of "Oh, Pretty Woman" as a creative work is not contested. In determining whether this factor should weigh in favor of the copyright holder we also ask whether the work "represented a substantial investment of time and labor made in anticipation of financial return." *MCA, Inc.*, 677

F.2d at 182. The record amply supports a finding in favor of Acuff-Rose on this factor.

Portion Used

The third factor we consider is the amount and substantiality of the portion of the copyrighted work used in the derivative work in relation to the copyrighted work as a whole. As applied to alleged parodies, this factor has historically turned on analysis of the "conjure up" test. *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 757 (9th Cir. 1978), *cert. denied sub nom., O'Neill v. Walt Disney Prods.*, 439 U.S. 1132 (1979). The test asks "whether the parodist has appropriated a greater amount of the original work than is necessary to 'recall or conjure up' the object of his satire." *Id.* The test describes a continuum of use, and not only scrutinizes the extent of the taking, but the qualitative nature of that taking. *Harper & Row*, 471 U.S. at 565. A *de minimis* use, one that is meager and fragmentary, by definition fails to conjure up the original and does not constitute an infringement. *Elesmere*, 482 F. Supp. at 744. The 2 Live Crew, appropriately, does not attempt to characterize its use of the copyrighted work as *de minimis*. Uses which depart from the *de minimis* level may nevertheless be fair uses, but at some point on the continuum this factor militates against a finding of fair use. *Air Pirates*, 581 F.2d at 757. Parodies are generally allowed to use more of the copyrighted work and still fall within the rubric of fair use than are other types of copying:

> [T]he concept of 'conjuring up' an original came into the copyright law not as a limitation on how much of an original may be used, but as a recognition that a parody frequently needs to be more than a fleeting evocation of an original in order to make its humorous point. A parody is entitled at least to 'conjure up' the original.

Elesmere, 623 F.2d at 253, n.1 (citation omitted).

The district court, having found that 2 Live Crew created a parody in the popular sense, applied the conjure up test. The amount of the original work which is appropriated is a factual issue, but the question whether the taking is excessive under the circumstances is one of law. *Fisher*, 794 F.2d at 438, n.4.

The district court, operating on the assumption that "Pretty Woman" is a parody, concluded: "In view of the fact that the medium is a song, its purpose is parody, and the relative brevity of the copying, it appropriates no more from the original than is necessary to accomplish reasonably its parodic purpose." *Acuff-Rose*, 754 F. Supp. at 1157. Clearly, the court was using the term parody in its popular sense. While it may not be inappropriate to find that no more was taken than necessary, the copying was qualitatively substantial. Both of defendants' affiants stated that 2 Live Crew's version tracks the music and meter of the original. These opinions were intended to demonstrate that the new song is a parody. However, these opinions point out the substantiality of copying. Near verbatim taking of the music and meter of a copyrighted work without the creation of a parody is excessive taking. *See MCA, Inc.*, 677 F.2d at 183-85. Most importantly, defendants' affiants stated that the song is built upon the recognizable bass or guitar riff of the original by repeating that riff eight times. Acuff-Rose's musicologist stated that the riff was probably sampled from the original, that is, simply recorded verbatim and then mixed with 2 Live Crew's additions. "[T]he fact that a substantial portion of the infringing work was copied verbatim is evidence of the qualitative value of the copied material, both to the originator and to the plagiarist who seeks to profit from marketing someone else's copyrighted expression." *Harper & Row*, 471 U.S. at 565. The qualitative degree of the copying is even more critical than the quantitative, and we ask what degree of the essence of the original is copied in relation to its whole. *See Salinger v. Random House, Inc.*, 811 F.2d 90, 98 (2d Cir.), *reh'g denied*, 818 F.2d 252, *cert. denied*, 484 U.S. 890 (1987). We

conclude that taking the heart of the original and making it the heart of a new work was to purloin a substantial portion of the essence of the original. The facts as developed under this factor, "the amount and substantiality of the portion used in relation to the copyrighted work as a whole" cannot be used in any way to support a finding of fair use.

Effect on Potential Market

This factor has been characterized as "undoubtedly the single most important element of fair use." *Harper & Row*, 471 U.S. at 566; *see also Stewart*, 495 U.S. at 238. This factor requires that a balance be struck "between the benefit gained by the copyright owner when the copying is found an unfair use and the benefit gained by the public when the use is held to be fair." *Rogers*, 960 F.2d at 311. To demonstrate that the balance weighs in favor of a finding of no fair use:

> Actual present harm need not be shown; such a requirement would leave the copyright holder with no defense against predictable damage. Nor is it necessary to show with certainty that future harm will result. What is necessary is a showing by a preponderance of the evidence that *some* meaningful likelihood of future harm exists. If the intended use is for commercial gain, that likelihood may be presumed. But if it is for a noncommercial purpose, the likelihood must be demonstrated.

Sony Corp., 464 U.S. at 451 (emphasis in original). The focus is on *potential* harm, and the "inquiry must take account not only of harm to the original but also of harm to the market for derivative works." *Harper & Row*, 471 U.S. at 568.

In the instant case, the use of the copyrighted work is wholly commercial, so that we presume that a likelihood of future harm to Acuff-Rose exists. *See Rogers*, 960

F.2d at 312 (the court holding that "there is simply nothing in the record to support a view that [defendant] produced [the derivative art work] for anything other than sale as high-priced art. Hence, the likelihood of future harm to [plaintiff's] photograph is presumed, and plaintiff's market for his work has been prejudiced").

Having determined that 2 Live Crew created a parody, the district court refused to indulge the presumption and concluded that "it is extremely unlikely that 2 Live Crew's song could adversely affect the market for the original" because the "intended audience for the two songs is entirely different." *Acuff-Rose*, 754 F. Supp. at 1158. In reaching this conclusion, the district court largely relied on the affidavit of Krasilovsky who stated, in part: "I cannot see how it [the new work] can affect the sales or popularity of the Orbison song, except to stimulate interest in the original." *Id.* Although we have already determined that harm for purposes of the fair use analysis has been established by the presumption attaching to commercial uses, we note that inquiry under the fourth statutory factor not only considers harm to the market for the original but harm to the market for derivative works as well. *Id.* This formulation was arrived at by Professor Nimmer, who provided an example relied upon by the *Rogers* court: "[A] movie adaptation is made of a book. Even though the movie may boost book sales, it is an unfair use because of the effect on the potential sale of adaptation rights." *Rogers*, 960 F.2d at 312 (citing 3 Nimmer, § 13.05[B]). Krasilovsky's statement is irrelevant as to the fourth statutory factor. The record on this factor does not support a finding of fair use.

Conclusion

Three of the factors set out in the statute weigh against a finding of fair use. One is, at best, neutral. In dealing with uses popularly termed parodies, the factors involving the commercial nature of the use and the damage to the defendant are of particular significance. It is likely, for example, that an identical use of the copyrighted work in

this case at a private gathering on a not-for-profit basis would be a fair use. It is the blatantly commercial purpose of the derivative work that prevents this parody from being a fair use.

We conclude that the district court erred in granting summary judgment to defendants. The four factors set forth in section 107 of the Act support the conclusion that 2 Live Crew's use of Acuff-Rose's copyrighted song was not a fair use. We **REVERSE** and **REMAND** for proceedings consistent with this opinion.

DAVID A. NELSON, Circuit Judge, dissenting. A Second Circuit panel that included both of the cousins Hand once called the "fair use" issue "the most troublesome in the whole law of copyright." *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939). It has been said, indeed, that the fair use doctrine "is so flexible as virtually to defy definition." *Time, Inc. v. Bernard Geis Assocs.*, 293 F.Supp. 130, 144 (S.D.N.Y. 1968).

Perhaps the most troublesome fair use issue of all is the question of whether a particular parody constitutes fair use of a copyrighted original. The parody cases appear to be in hopeless conflict. Compare, for example, *Loew's, Inc. v. Columbia Broadcasting System*, 131 F.Supp. 165 (S.D. Cal. 1955), *aff'd sub nom. Benny v. Loew's, Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd by an equally divided court*, 356 U.S. 43 (1958) (Jack Benny's parody of the motion picture "Gaslight" held not to be fair use of the original), with *Berlin v. E. C. Publications, Inc.*, 329 F.2d 541 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964) (Mad Magazine parodies of Irving Berlin songs held to be fair use).[1] *Cf. Columbia Pictures Corp. v. National Broadcasting Co.*, 137 F.Supp. 348 (S.D. Cal. 1955), where the same district judge who rejected the fair use defense for Jack Benny's parody of "Gaslight" accepted the defense for a Sid Caesar parody of "From Here to Eternity." In sum, whether a particular parody is entitled to the protection of the fair use doctrine is a question likely to be dealt with by lower courts in much the same way that the Supreme Court deals with more than a few

[1] As *Berlin* points out, 329 F.2d at 544-45, *Loew's* has been widely criticized. Among the critics is no less a figure than Professor (later Justice) Benjamin Kaplan. See Kaplan, *An Unhurried View of Copyright* (1967) at 69. The Ninth Circuit has said that its *Loew's* decision "was essentially repudiated by Congress's recognition of parody in the notes to the Copyrights Act of 1976." *Fisher v. Dees*, 794 F.2d 432, 435 (9th Cir. 1986), citing 17 U.S.C.A. § 107 Historical Note. (The Note quotes House Report No. 94-1476 as listing "use in a parody of some of the content of the work parodied" as among "the sort of activities the courts might regard as fair use under the circumstances.")

questions of constitutional law; we think we know fair use when we see it, even if we cannot do a very good job of relating what we see (or do not see) to the governing text.

The text that is pertinent here is statutory, not constitutional.[2] Where parody is concerned, however, the guidance provided by the statute is at least as Delphic as that sometimes provided by the Constitution. The Copyright Act says that "the fair use of a copyrighted work . . . for purposes *such as* criticism, comment . . . scholarship or research, is not an infringement of copyright." 17 U.S.C. § 107 (emphasis supplied). (The statute itself tells us that the words "such as" mean what they say and "are illustrative and not limitative." 17 U.S.C. § 101.) The statute then goes on to list four factors that shall be "include[d]" among the factors considered by a court in determining a question of fair use: "In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall *include* [the four factors.]" Section 107 (emphasis supplied). Here again, the list provided by Congress is "nonexclusive," to borrow the term used in *Harper & Row, Publishers, Inc. v. Nation Enterprises*,

[2]There are, to be sure, authorities who would constitutionalize copyright law. Some would treat satire as sacrosanct under the First Amendment. See, *e.g.*, Goetsch, "Parody as Free Speech — The Replacement of the Fair Use Doctrine By First Amendment Protection," 3 W. New Eng. L. Rev. 39 (1980). Others would accord constitutional protection to any parody a limitation on which would, in the opinion of the judge, impede "the Progress of Science" as that phrase is used in the Copyright Clause, Art. I, § 8 of the Constitution. See Bisceglia, "Parody and Copyright Protection: Turning the Balancing Act Into a Juggling Act," ASCAP Copyright Law Symposium No. 34 (1987) at 23. As for me, I cannot work up much enthusiasm for turning every copyright case into a mini-*Marbury v. Madison* or *New York Times Co. v. Sullivan*. The major role in determining how to promote the progress of science has been given, after all, to Congress: "As the text of the Constitution makes plain, it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors. . . ." *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984). The Ninth Circuit has rejected out of hand the notion that the First Amendment gives parodists a blanket protection from copyright infringement actions. *Fisher v. Dees*, 794 F.2d 432, 434 n.2 (9th Cir. 1986).

471 U.S. 539, 549 (1985); the court is free to consider any other factors that may be relevant.

Where we are dealing with parody, as I shall suggest, unenumerated factors may have no less relevance than the four set forth in the statute — and the statutory factors are likely to have a somewhat different impact on our deliberations than they would in a non-parody situation. Before turning to these matters, however, I think it would be helpful to consider what it is we are talking about when we speak of "parody."

The etymology of the word has direct relevance to this case. The term comes from the Greek *parodeia*, meaning "a song sung alongside another."[3] The musical parody is thus the very archetype of the genre.

One of the best definitions I have come across is the following, which appears in a prize-winning student essay:

> "A parody is a work that transforms all or a significant part of an original work of authorship into a derivative work by distorting it or closely imitating it, for comic [or, I would add, for satiric] effect, in a manner such that both the original work of authorship and the independent effort of the parodist are recognizable." *Clemmons*, "Author v. Parodist: Striking a Compromise," ASCAP Copyright Law Symposium No. 33 (1987) at 101.[4]

[3]VII Encyclopedia Britannica (15th ed. 1975) at 768. "*Parodeia*" joins the Greek words for "beside" and "to sing" — the roots of our prefix "para" and our word for a lyric poem, "ode." Webster's New International Dictionary (3d ed. 1961).

[4]See also Note, "The Parody Defense to Copyright Infringement: Productive Fair Use After *Betamax*," 97 Harv. L. Rev. 1395 (1984): "Parody, in its purest form, is the art of creating a new literary, musical, or other artistic work that both mimics and renders ludicrous the style and thought of an original." The examples cited by the Harvard editors are Cervantes' *Don Quixote* (1614), Pope's *The Rape*

Some authorities go on to suggest that if the derivative work is to be treated as true parody, it must do more than achieve a comic effect: "It must also make some critical comment or statement about the original work which reflects the original perspective of the parodist -- thereby giving the parody social value beyond its entertainment function." *Metro-Goldwyn-Mayer v. Showcase Atlanta Cooperative Productions, Inc.*, 479 F.Supp. 351, 357 (N.D. Ga. 1979); *New Line Cinema Corp. v. Bertlesman Music Group, Inc.*, 693 F.Supp. 1517, 1525 (S.D.N.Y. 1988). See also Faaland, "Parody and Fair Use: The Critical Question," 57 Wash. L. Rev. 163 (1981); Bisceglia, "Parody and Copyright Protection: Turning the Balancing Act into a Juggling Act," ASCAP Copyright Law Symposium No. 34, (1987). But whether or not a derivative work must "criticize" the original, I am not sure that I understand the reservations my colleagues on the panel have expressed in this case about accepting the district court's conclusion that 2 Live Crew's "Pretty Woman" is in fact a parody of the Acuff-Rose original. Under anyone's definition, it seems to me, the 2 Live Crew song is a quintessential parody.

The Second Circuit faced a similar definitional question in *Berlin v. E.C. Publications Inc.*, 329 F.2d 541 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964). One of the Irving Berlin pieces on which the Mad Magazine people had worked their peculiar magic was the song "A Pretty

---

of the Lock (1712), and Austen's *Northanger Abbey* (1818), all of which parodied then-popular literary genres. Judge Yankwich provides a much longer list of well known parodies in his article "Parody and Burlesque in the Law of Copyright," 33 Can. B. Rev. 1131 (1955). The art form goes back at least as far as Aristophines, the famous comic dramatist of ancient Greece, whose play *The Frogs* (405 B.C.) -- a work still performed today -- spoofed the plays of Aeschylus and Euripides.

Parodies often outlast and outshine the works parodied. A good example is Lewis Carroll's "You Are Old, Father William," a takeoff on Southey's work "The Old Man's Comforts." The texts, which are strikingly similar in form, may be read side-by-side in the appendix to Bisceglia, "Parody and Copyright Protection: Turning the Balancing Act into a Juggling Act," ASCAP Copyright Law Symposium No. 34 (1987) at 37-38.

Girl is Like a Melody." (Messrs. Orbison and Dees are obviously not the first tunesmiths to have turned their attention to a comely female.) The defendants, in the words of the court,

> "transformed the plaintiffs' 'A Pretty Girl Is Like a Melody,' into 'Louella Schwartz Describes Her Malady'; what was originally a tribute to feminine beauty became a burlesque of a feminine hypochondriac troubled with sleeplessness and a propensity to tell the world of her plight." *Id.* at 543.

This was "parody," the Second Circuit said -- and it was parody that constituted fair use of Irving Berlin's original work:

> "For, as a general proposition, we believe that parody and satire *are* deserving of substantial freedom -- both as entertainment and as a form of social and literary criticism. As the readers of Cervantes' 'Don Quixote' and Swift's 'Gulliver's Travels,' or the parodies of a modern master such as Max Beerbohm well know, many a true word is indeed spoken in jest." *Id.* at 545.

In *Fisher v. Dees*, 794 F.2d 434 (9th Cir. 1986), similarly, the Ninth Circuit had occasion to analyze a pair of songs about women named "Sunny" or "Sonny." The first piece, recorded in the 1950s by Johnny Mathis, was entitled "When Sunny Gets Blue." The second, released in 1985 under the title "When Sonny Sniffs Glue," copied the first six bars (the recognizable main theme) of the original song's 38 bars. The derivative work transformed the original opening lyrics -- "When Sunny gets blue, her eyes get gray and cloudy, then the rain begins to fall" -- into "When Sonny sniffs glue, her eyes get red and bulgy, then her hair begins to fall." *Id.* at 434. After listening to tapes of both songs, the Ninth Circuit panel had no difficulty at all in rejecting an argument that "the so-called parody is not actually a parody, or at least is not

a parody of the composer's song." *Id.* at 436. Said the court,

> "Although we have no illusions of musical expertise, it was clear to us that Dees's version was intended to poke fun at the composers' song, and at Mr. Mathis's rather singular vocal range. We reject the notion that the song was used merely as a vehicle to achieve a comedic objective unrelated to the song, its place and time." *Id.*

Like the Second Circuit panel in *Berlin*, the *Fisher* court affirmed a finding that the parody was entitled to fair use protection as a matter of law. *Id.* at 440.

I myself have no more "illusions of musical expertise" than did the members of the court that decided *Fisher v. Dees*. After listening, however, to Exhibits D and E, the tapes of the two "Pretty Woman" songs, I am satisfied that the 2 Live Crew version both imitates and distorts the original work for comic or satiric effect, and does so in such a way that both the original work and the work of the parodist are readily recognizable. The parody (done in an African-American dialect) was clearly intended to ridicule the white-bread original -- and if a higher criticism is necessary to qualify the derivative work as true parody, such criticism is readily discernible.

The affidavit of Oscar Brand explains, as Judge Joiner has noted, that "this anti-establishment singing group [2 Live Crew] is trying to show how bland and banal the Orbison song seems to them." The district court accepted Brand's explanation. 754 F.Supp. at 1155. So do I. Whether one likes the original or not -- and the maxim "*de gustibus non est disputandum*" comes to mind here -- the original is quite clearly being held up to criticism by 2 Live Crew.

Consider the plot, if one may call it that, of the original work. A lonely man with a strangely nasal voice sees a pretty woman (name unknown) walking down the street.

The man speculates on whether the woman is lonely too. Apostrophizing her in his mind, he urges her to stop and talk and give him a smile and say she will stay with him and be his that night. The woman walks on by, and the man resigns himself to going home alone. Before he leaves, however, he sees the woman walking back to him. End of story.

This little vignette is intended, I think, to be sort of sweet. While it is certainly suggestive, it is also, by the standards of its time, "romantic" rather than indelicate. The singer evokes a sexual theme in his soliloquy, but then leaves the realization of his desire to the listener's imagination.

The parody by 2 Live Crew is much more explicit, and it reminds us that sexual congress with nameless streetwalkers is not necessarily the stuff of romance and is not necessarily without its consequences. The singers (there are several) have the same thing on their minds as did the lonely man with the nasal voice, but here there is no hint of wine and roses. The 2 Live Crew singers -- randy misogynists, not lonely Sir Lancelots -- raucously address a "big hairy woman" and her "bald-headed friend," one or both of whom are urged to "let the boys jump in." One singer chides a woman (the big hairy one, I think) for having cheated on him ("Two timin' woman/You's out with my boy last night"). In the end, this cloud proves to have what the singer sees as a silver lining:

> "Two timin' woman/That takes a load off my mind
> Two timin' woman/Now I know the baby ain't mine."

This, I should say, is "criticism" with a vengeance -- and the thematic relationship to the original is obvious. The relationship between the copyrighted song and the parody is every bit as patent here as was the corresponding relationship between the songs considered by the courts in *Elsmere Music, Inc. v. National*

Broadcasting Co., 482 F.Supp. 741 (S.D.N.Y. 1980), *aff'd* 623 F.2d 252 (2d Cir. 1980). That case involved an oft-repeated advertising jingle known as "I Love New York" and a Saturday Night Live take-off entitled "I Love Sodom." The parody was held to constitute a fair use of the original. The statutory factors, in my view, fully support a corresponding result in the instant case.

* * *

The first of the factors that we must consider is this:

> "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes. . . ."

In the case before us, of course, the purpose is parody and the character is commercial. Does the mere fact that the parodists hoped to make money mean that their use of the original work is presumptively unfair? I am by no means convinced that the Supreme Court would so hold -- and any such presumption would be readily rebuttable in any event.

It is true that in the *Betamax* case, *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984), the Court made the broad statement that "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright. . . ." It is also true that this statement was quoted with approval in *Harper & Row*, 471 U.S. at 562. But both of those cases involved mechanical copying, literally or figuratively, without alteration of the copied material.

There is a difference, obviously, between copying and caricaturizing. By calling into being a new and transformed work, the caricaturist exercises a type of creativity that is foreign to the work of the copyist. And the creative work of the caricaturist is surely more

valuable than the reproductive work of the copyist. Thus it has been suggested that the presumption of unfairness in cases of commercial exploitation "is sensible and appropriate only when applied to commercial *reproductive* uses. . . ." Note, "The Parody Defense to Copyright Infringement: Productive Fair Use After *Betamax*," 97 Harv. L. Rev. 1395, 1408 (1984).

An illustration may help. W.S. Gilbert and Sir Arthur Sullivan created comic operas that are among the most commercially successful of all time. Gilbert and Sullivan certainly cannot be said to have had "nonprofit educational purposes" in mind when they wrote such a work as *Princess Ida*, one of their minor masterpieces. *Princess Ida* was, in Gilbert's words, "a respectful operatic perversion" of "The Princess," a lengthy poem by Tennyson. Would the world not be a poorer place if Lord Tennyson could have stilled the voice of W.S. Gilbert merely because Gilbert's purposes included the making of money? For anyone who loves Gilbert and Sullivan -- and their number is legion -- the question answers itself.

Similarly, I think, the world would be the poorer if the holders of the copyright on "I Love New York" had been allowed to block the Saturday Night Live rendition of "I Love Sodom." "[I]n today's world of often unrelieved solemnity," as the Second Circuit panel remarked in affirming the judgment in favor of Saturday Night Live, "copyright law should be hospitable to the humor of parody. . . ." *Elsmere Music Co., Inc.*, 623 F.2d at 253.

We should almost certainly be hospitable to the humor of parody if we allowed ourselves to be guided, as the Supreme Court was guided in the *Betamax* case, "by Justice Stewart's exposition of the correct approach to the ambiguities in the law of copyright." *Sony*, 464 U.S. at 431. The cause that is ultimately to be served, Justice Stewart observed in *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975), is "the cause of promoting broad public availability of literature, music

and other arts." What Justice Stewart called the "ultimate aim" of copyright law is "to stimulate artistic creativity for the general public good." *Id.* (footnote omitted). If we keep this ultimate aim in mind, it seems to me, we are not likely to conclude that parody for profit is presumptively "unfair."

* * *

The second statutory factor to be considered is

"(2) the nature of the copyrighted work. . . ."

The pertinent data in this connection are that Orbison and Dees published "Oh, Pretty Woman" long before the alleged infringement occurred, and that theirs is a work of the imagination rather than a piece of historical reportage.

That the original song had long since been published is a factor which works in favor of the 2 Live Crew defendants. See *Harper & Row*, 471 U.S. at 564, where the Supreme Court declared that "the scope of fair use is narrower with respect to unpublished works." The fact that "Oh, Pretty Woman" is a creative work might tend to offset the publication factor, perhaps, if the work were not being used for the purpose of parody. But parody routinely sets its sights on the fictive as opposed to the factual. If, as the Second Circuit insists, "parody and satire *are* deserving of substantial freedom," *Berlin*, 329 F.2d at 545, it would make no sense at all to penalize the parodist for taking as his subject precisely the sort of work that has been grist for parodists' mills for the last two and a half millennia.

* * *

The third statutory factor is a somewhat problematical one, where parody is concerned:

"(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole. . . ."

The "portion used" test is problematical in this context because parody cannot be parody unless it allows the original work to shine through in a form which, while distorted, is recognizable. "Parody by its nature demands close imitation," Bisceglia, "Parody and Copyright Protection," ASCAP Copyright Law Symposium No. 34 at 17; substantial usage is thus almost a given.

The Ninth Circuit has held that the fair use defense must fail when the purported parodists' copying "is virtually complete or almost verbatim." *Walt Disney Productions v. Air Pirates*, 581 F.2d 751, 756 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979). I have no quarrel with this formulation; near-verbatim copying is closer to plagiarism than it is to parody. But neither the music nor the lyrics of 2 Live Crew's "Pretty Woman" can fairly be said to constitute near-verbatim copying of the Orbison and Dees original.[5]

"At the very least," the Second Circuit has said, a parody will pass muster under the "portion used" factor "where the parodist does not appropriate a greater amount of the original work than is necessary to 'recall or conjure up' the object of his satire. . . ." *Berlin*, 329 F.2d at

[5]I recognize that the affidavit of musicologist Earl Spielman refers to a "one measure guitar lick" that "may have actually been sampled or lifted and then incorporated into the recording of 'Pretty Woman' as performed by The 2 Live Crew." But the Copyright Act "protects only those sound recordings 'fixed' on or after February 15, 1972," Note, "Digital Sound Sampling, Copyright and Publicity: Protecting Against the Electronic Appropriation of Sounds," 87 Col. L. Rev. 1723, 1727-28 (1987), citing 17 U.S.C. § 301(c); Orbison and Dees recorded "Oh, Pretty Woman" in 1964. It is arguable, moreover, that a "sampling" of no more than a few notes should be governed by the maxim *de minimis non curat lex*. *Id.* at 1735. Finally, the plaintiffs have not shown by a preponderance of the evidence that any sampling really occurred here — and to my untrained ear, at least, it is obvious that most of the 2 Live Crew music was not lifted electronically from the 1964 recording.

545. Saturday Night Live's "I Love Sodom" was held to pass the "conjure up" test,[6] and 2 Live Crew's "Pretty Woman" does not appear to have appropriated more of the original on which it was based than did "I Love Sodom."

The district court (Wiseman, J.) made these observations about the amount and substantiality of the mimicry in the 2 Live Crew song:

> "In this case, 2 Live Crew has not mimicked so much of 'Oh, Pretty Woman' that it runs afoul of the substantiality factor. Notable aspects of the original song are plainly present in 2 Live Crew's version but, unlike *Air Pirates*, this is not a case of virtually complete or verbatim copying. Rather this case falls in the realm of parodies envisioned by *Fisher* and *Berlin*. In view of the fact that the medium is a song, its purpose is parody, and the relative brevity of the copying, it appropriates no more from the original than is necessary to accomplish reasonably its parodic purpose. *Fisher*, 794 F.2d at 439." 754 F.Supp. at 1157.

I cannot improve on Judge Wiseman's analysis of the substantiality factor.

* * *

The last of the statutory factors is this:

[6]The Second Circuit noted by way of dictum in that case that "[e]ven more extensive use [than that necessary to 'conjure up' the original] would still be fair use, provided the parody builds upon the original, using the original as a known element of modern culture and contributing something new for humorous effect or commentary." 623 F.2d at 253 n.1. Professor Nimmer's treatise asserts that "[t]his went too far," adding that "[t]he Second Circuit later drew back from this extreme. . . ." 3 Nimmer on Copyright, § 13.03[f] at 13-90.9-.10 (1992), citing *Warner Bros., Inc. v. American Broadcasting Companies*, 654 F.2d 204 (2d Cir. 1981), and *MCA, Inc. v. Wilson*, 677 F.2d 180 (2d Cir. 1981). I am by no means sure that the *Elsmere* dictum did go too far, but it makes no difference in the case at bar; the 2 Live Crew song passes the "conjure up" test in any event.

> "(4) the effect of the use upon the potential market for or value of the copyrighted work."

To me, at least, it seems as clear in this case as it did to the Second Circuit in *Berlin* that "the parody has neither the intent nor the effect of fulfilling the demand for the original. . . ." 329 F.2d at 545.

The affidavit of Oscar Brand says that

> "Parodies have never interfered with the popularity of the original. * * * The sales graph of 'Hello, Dolly' didn't change when it became 'Hello, Lyndon,' and 'Hello, Nixon.' Hundreds of popular songs have been 'covered' by parody performances and recordings without altering their popular appeal or interfering with their sales."

Although Brand's assertion that parodies have "never" interfered with the popularity of the original strikes me as dubious, there has been no showing of any such interference here.[7] Brand -- who is probably on firmer ground when he sticks to the specifics of this case -- explains that the audiences for the two songs are quite different:

> "There is no question in my mind that the song "Oh, Pretty Woman" by Roy Orbison and William Dees was intended for Mr. Orbison's country music audience and middle-America.
>
> [ ] On the other hand, 2 Live Crew's version[ ], which is unquestionably a comic parody, is aimed at the large black populace which used to buy what was once called 'race' records. The group's

[7]Because parody is a special case, moreover, a drop in the popularity of the original "Oh, Pretty Woman" would be of doubtful relevance anyway. "[W]e must accept the harsh truth that parody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically." Kaplan, *An Unhurried View of Copyright*, at 69.

> popularity is intense among the disaffected, definitely not the audience for the Orbison song. I cannot see how it can affect the sales or popularity of the Orbison song, except to stimulate interest in the original."

Brand's analysis of the market stands unrefuted. One month after Brand gave his affidavit, the plaintiff's Director of Licensing, Gerald Tiefer, executed an affidavit in which there is no attempt to deny that the two songs are aimed at different markets.[8] Mr. Tiefer does suggest, however, that the 2 Live Crew parody could impair the value of the plaintiff's right to grant licenses to parodists. And Mr. Jerry Flowers, Executive Director of Publishing for the plaintiff's parent corporation, says in an affidavit that the licensing of parodies of established hit songs has become extremely lucrative.

Judge Joiner invites our attention, in this connection, to *Rogers v. Koons*, 960 F.2d 301, 312 (2d Cir. 1992), where the Second Circuit observed that "the inquiry considers not only harm to the market for the original [work], but also harm to the market for derivative works." In a passage a portion of which was quoted with approval in *Harper & Row*, 471 U.S. at 568, similarly, the Nimmer treatise says that "[i]f the defendant's work adversely affects the value of any of the rights of the copyrighted work . . . [including the right to license derivative works,] the use is not fair even if the rights thus affected have not as yet been exercised by the plaintiff." 3 Nimmer on Copyrights, § 13.05[B] at 13-88.19 (1992) (citations omitted).

Nimmer, however, is not discussing parody here; the quoted passage deals with a motion picture hypothetically adopted from a copyrighted novel. And neither *Rogers v.*

[8]This case is thus different from *New Line Cinema Corp. v. Bertlesman Music Group*, 693 F.Supp. 1517 (S.D.N.Y. 1988), where testimony "unequivocally established that the songs 'Nightmare on My Street' and 'Are You Ready for Freddy?' are in direct competition." *Id.* at 1528.

Koons nor *Harper & Row* involved parody either. The former was a case in which a sculpture had been copied with great fidelity from a photograph -- the artisans who produced the sculpture were told that the "*work must be just like photo*," 960 F.2d at 305 -- and the latter was a case in which quotations from the unpublished manuscript of President Ford's autobiography were lifted by the defendant verbatim.

Parody, again, is different. It transforms as it copies, and it may well savage the original work in the process. In the past, at least, copyright holders have not been overly enthusiastic about agreeing to see their works parodied -- and the law itself has licensed parodists, much as the law has given license to book reviewers, drama critics, and other commentators. Ours is a commercial age, to be sure, and consensual "parody licenses" may be more common now than they used to be. I confess that I am still uneasy, however, about the prospect of the courts turning copyright holders into censors of parody. Neither the history of the fair use doctrine nor the four factors enumerated in the Copyright Act compel such a result. "[P]ermissible parody, whether or not in good taste, is the price an artist pays for success. . . ." *MCA, Inc. v. Wilson*, 677 F.2d 180, 191 (2d Cir. 1981) (Mansfield, J., dissenting).

I said earlier in this opinion that there may be factors which, although not enumerated in the Copyright Act, merit consideration by the courts in determining when parody constitutes fair use. I shall mention only one such factor -- one foreshadowed in what has already been said. It is this: *the social value of the parody as criticism.*

In the case at bar, it seems to me, this factor militates rather strongly in favor of affirmance of the district

court's finding of fair use. The 2 Live Crew "Pretty Woman" is hopelessly vulgar, to be sure,[9] but we ought not let that fact conceal what may be the song's most significant message — for here the vulgarity, to paraphrase Marshall McLuhan, *is* the message. The original work may not seem vulgar, at first blush, but the 2 Live Crew group are telling us, knowingly or unknowingly, that vulgar is precisely what "Oh, Pretty Woman" is. Whether we agree or disagree, this perception is not one we ought to suppress.

---

[9]Vulgarity, in practice, probably cuts against acceptance of the parody defense. See *MCA, Inc. v. Wilson*, 677 F.2d 180, 185 (2d Cir. 1981), where the panel majority said this:

> "We are not prepared to hold that a commercial composer can plagiarize a competitor's copyrighted song, substitute dirty lyrics of his own, perform it for commercial gain, and then escape liability by calling the end result a parody or satire on the mores of society." *MCA, Inc. v. Wilson*, 677 F.2d 180, 185 (2d Cir. 1981).

I have some sympathy for this attitude, particularly where the parties really are "competitors;" be the lyrics of the derivative work dirty or clean, it goes against the grain to let a competitor reap where he has not sown. In the case at bar, however, there has been no showing that the parties are competitors. The 2 Live Crew song, moreover, is not just "a parody or satire on the mores of society" — it is a parody or satire on the mores of Orbison's Pretty Woman and her admirer.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

3:90-0524

ACUFF-ROSE MUSIC, INC.

v.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVIS HOBBS a/k/a Mr. Mixx, p/k/a THE 2 LIVE CREW and LUKE SKYYWALKER RECORDS

MEMORANDUM

This case involves a claim by Acuff-Rose Music, Inc. ("Acuff-Rose") for copyright infringement of its song, "Oh, Pretty Woman." Acuff-Rose has named as defendants the members of the rap group 2 Live Crew and Luke Skyywalker Records. The plaintiff contends that the defendants unfairly are trying to cash in on the popularity of "Oh, Pretty Woman."

For the reasons stated below, the Court finds that no genuine issue of material fact exists regarding the allegation of copyright infringement. This claim is dismissed pursuant to Fed. R. Civ. P. 56. The plaintiff's pendent tort claims are preempted by 17 U.S.C. § 301.

Appendix B

I.

This copyright case involves Roy Orbison's musical hit "Oh, Pretty Woman" as recorded by 2 Live Crew. Roy Orbison and William Dees co-authored "Oh, Pretty Woman" in 1964 and assigned their rights in the song to Acuff-Rose Music the same year. "Oh, Pretty Woman" was copyrighted by Acuff-Rose in 1964. Since then the song has continued to generate profits for Acuff-Rose.

On July 5, 1989, 2 Live Crew's manager, Linda Fine, wrote Gary Teifer of Opryland U.S.A., Inc. and Acuff-Rose. Fine informed Teifer that 2 Live Crew was going to parody "Oh, Pretty Woman," that Orbison and Dees would receive full credit as owners and authors, and that 2 Live Crew would pay Acuff-Rose the statutorily required rate for use of the song. Teifer responded on July 17, denying the license request and informing Fine that "we cannot permit the use of a parody of 'Oh, Pretty Woman.' "

On July 15, 1989, 2 Live Crew released its version of "Oh, Pretty Woman" on record albums, tapes and compact discs, entitled "As Clean As They Wanna Be." The release, called "Pretty Woman," is on side B, sandwiched between "Me So Horny" and "My Seven Bizzos." Both the compact disc cover and compact disc itself acknowledge Orbison and Dees as the authors of "Oh, Pretty Woman" and Acuff-Rose as the publisher.

Almost one year later, on June 18, 1990, Acuff-Rose sued 2 Live Crew and their record company, Luke Skyywalker Records, for copyright infringement, interference with business relations, and interference with prospective business advantage for the performance and distribution of a copy of "Oh, Pretty Woman." Acuff-Rose contends that the lyrics of "Oh, Pretty Woman" as sung by 2 Live Crew "are not consistent with good taste or would

Appendix B

disparage the future value of the copyright." Moreover, Acuff-Rose charges that 2 Live Crew's music is substantially similar in melody to "Oh, Pretty Woman" and the lyrics of the first verse are substantially similar to that of the original version. In response, defendants have moved for summary judgment. They argue that "Pretty Woman" is a parody that constitutes fair use under 17 U.S.C. § 107 of the Copyright Act, 17 U.S.C. §§ 101-914 (1982). They also argue that the two tort claims are preempted by 17 U.S.C. § 301. Pursuant to Fed. R. Civ. P. 67, 2 Live Crew has deposited with the Court the $13,867 it maintains is due to Acuff-Rose for use of its song as required by the Copyright Act. This decision does not address whether that sum reflects adequate compliance with the Act.

The resolution of this motion presents two questions for the Court to address: first, whether "Pretty Woman" constitutes fair use of copyrighted material pursuant to 17 U.S.C. § 107; and second, whether the plaintiff's state law claims are preempted by federal copyright law.

II.

A. Standard of review

Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1476-80 (6th Cir. 1989). The party seeking summary judgment bears the initial burden of showing the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. In responding to a motion for summary judgment, the nonmoving party cannot rest on its pleadings, but must present some "specific facts showing that there is a genuine issue for trial." *Id.* at 324.

Appendix B

The Supreme Court concluded in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), that a dispute about a material fact is "genuine" within the meaning of Fed. R. Civ. P. 56 only if "the evidence is such that a responsible jury could return a verdict for the nonmoving party." 477 U.S. at 248. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient." *Id.* at 252. Of course, the court is to construe the evidence and all inferences to be drawn from it in the light most favorable to the nonmoving party. *Id.* at 255.

B. Fair Use

To foster the widespread dissemination of ideas, the copyright system is "designed to assure contributors to the store of knowledge a fair return for their labors." *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 546 (1985). *See Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (purpose of copyright is to create incentives for creative effort). Notwithstanding the monopoly granted to the owner, fair use has been defined as the "privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent." *Harper & Row*, 471 U.S. at 549 (quoting H. Ball, *Law of Copyright and Literary Property*, 260 (1944)).

Section 107 of the Copyright Act instructs courts to balance the following four factors:

In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —

> (1) the purpose and character of the use, including whether such use is a commercial nature or is for nonprofit educational purposes;

Appendix B

> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

At a minimum, courts have indicated that evaluation of these four factors is required. But they are not exclusive. *Harper & Row*, 471 U.S. at 560; *Pacific & Southern v. Duncan*, 744 F.2d 1490, 1495 n.7 (11th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985).

Before the court may move to the merits of the statutory fair use analysis, it must consider whether this case is suitable for summary judgment. Plaintiffs allege that a number of material issues of fact remain. "Fair use is a mixed question of law and fact." *Harper & Row*, 471 U.S. at 560 (quoting *Pacific & Southern Co.*, 744 F.2d at 1495 n. 8). "Where the district court has found facts sufficient to evaluate each of the statutory factors, an appellate court 'need not remand for further factfinding . . . [but] may conclude as a matter of law that [the challenged use] do[es] not qualify as a fair use of the copyright work.' " *Id.* Based on the evidence presented by the parties in this case, including copies of the songs, correspondence and affidavits, whether defendant's parody constitutes fair use under 17 U.S.C. § 107 is a question of law for the Court to determine. *See Fisher v. Dees*, 794 F.2d 432, 436 (9th Cir. 1986) (although discovery not commenced, since "parties dispute only the ultimate conclusions to be drawn from the admitted facts . . . we can make them without usurping the function of the jury").

Appendix B

Since no genuine material issues of fact remain, the Court will proceed to address the four factors cited by § 107.[1]

1. *Purpose and Character of the Use.* The first factor the Court must consider is the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes. As examples of fair use, the preamble of § 107 lists "criticism, comment, news reporting, teaching . . . scholarship, [and] . . . research." 17 U.S.C. § 107. Congress has listed parody as one of those activities that might qualify for the fair use exception. *See* H.R. Rep No. 1476, 94th Cong., 2d Sess., 65 (1976), *reprinted in* 1976 U.S. Code Cong. Admin. News 5680. Obviously, 2 Live Crew's song is included on a commercially distributed record album sold for the purpose of making a profit.

Although 2 Live Crew's primary goal in releasing "As Nasty As They Wanna Be" is to sell its music, that finding "does not necessarily negate a fair use determination. . . ." 3 M. Nimmer, *Nimmer on Copyright*, § 13.05[A] at 13-70 (1990). In *Harper & Row*, the Court stated that a commercial purpose merely "tends to weigh against a finding of fair use." *Harper & Row*, 471 U.S. at 562. "The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price." *Id.*

Importantly for the purposes of this case, it is plain that 2 Live

1. No published Sixth Circuit opinion addresses this type of copyright infringement question. *Compare Pro Arts, Inc. v. Hustler Magazine, Inc.*, 787 F.2d 592 (6th Cir. 1986) (per curiam) (unpublished text in Westlaw). Accordingly, this Court relies on opinions from other circuits, notably the Second and Ninth Circuits.

Appendix B

Crew also desired to parody the original version of "Oh, Pretty Woman."[2] In copyright law, courts have long recognized that satirical expression is "deserving of substantial freedom — both as entertainment and as a form of social and literary criticism." *Berlin v. E.C. Publication, Inc.*, 329 F.2d 541, 545 (2nd Cir.), *cert. denied*, 379 U.S. 822 (1964). Including parody within the fair use doctrine has been recognized as "a means of fostering the creativity protected by the copyright law." *Warner Bros., Inc. v. American Broadcasting Companies*, 720 F.2d 231, 242 (2d Cir. 1983).

Many parodies "distributed commercially may be 'more in the nature of an editorial or social commentary than . . . an attempt to capitalize financially on the plaintiff's original work.' " *Fisher v. Dees*, 794 F.2d 432, 437 (9th Cir. 1986) (quoting *Pillsbury Co. v. Milky Way Productions, Inc.*, 215 U.S.P.Q. 124, 131 (N.D. Ga. 1981)); *Cf. Original Appalachian Artworks v. Topps Chewing Gum*, 642 F. Supp. 1031, 1034 (N.D. Ga. 1986) (holding that primary purpose behind defendant's parody "is not an effort to make a social comment but is an attempt to make money"). As discussed in Section II.B.4, *infra*, the defendant may rebut the presumption of commercial use as described in *Harper & Row* by convincing the court that the parody does not unfairly diminish the economic value of the original. *Fisher*, 794 F.2d at 437.

Acuff-Rose argues that the song is not a parody. It contends

2 *Dallas Cowboys Cheerleaders v. Pussycat Cinema*, 467 F. Supp. 366, 376 (S.D.N.Y.), *aff'd*, 604 F.2d 200 (2d Cir. 1979), defines parody as "a work in which the language or style of another work is closely imitated or mimicked for comic effect or ridicule." *See* Dorson, *Satiric Appropriation and the Law of Libel, Trademark and Copyright: Remedies Without Wrongs*, 65 B.U.L. Rev. 923, 924 (1985) (Parody "is a potent form of social commentary which attempts to expose the foibles and follies of society in direct, biting, critical, and often harsh language — tempered by humor.").

that the 2 Live Crew's version does not comment on the copyrighted work because the former is "primarily about the physical attributes of women" and the latter is "primarily about loneliness."

But based on a comparison of the two songs and the affidavits provided to the Court, it is apparent that 2 Live Crew has created a comic parody of "Oh, Pretty Woman."[3] The theme, content and style of the new version are different than the original. In his affidavit, Luther Campbell, also known as Luke Skyywalker, states that his version of "Oh, Pretty Woman" was written as a parody designed "through comic lyrics, to satirize the original work. . . ." He acknowledges that he purposefully copied selected music and lyrics from "Oh, Pretty Woman" as a device to help listeners identify the parody with the original version. Acuff-Rose may not like it, and 2 Live Crew may not have created the best parody of the original, but nonetheless the facts convincingly demonstrate that it is a parody.

2 Live Crew's lyrics provide the strongest evidence of its attempt to parody "Oh, Pretty Woman." Although the parody starts out with the same lyrics as the original, it quickly degenerates into a play on words, substituting predictable lyrics with shocking ones.[4] The first lyrical hint that something is amis comes when a

3 Gerry Teifer's comment in his July 17, 1990 letter to 2 Live Crew that the new version of "Oh, Pretty Woman" is a parody does not necessarily equate with the specific legal definition of parody. Teifer says in his affidavit that he never heard the 2 Live Crew version prior to denying their licensing request.

4 It is unclear exactly what Acuff-Rose means when it complains in its response to the Motion for Summary Judgment that the parody "dirt[ies]" the copyright. 2 Live Crew's version is neither obscene nor pornographic. Even if the work included pornographic references, that does not necessarily preclude a finding of fair use. *Pillsbury Co. v. Milky Way Productions, Inc.* 215 U.S.P.Q. 124, 131 (N.D. Ga. 1981).

loud, barking laugh immediately follows the first two words of the parody, "pretty woman." (Laughter follows later in the song too.) The purpose of the laughter is soon explained as the ensuing choruses respectively depict a big, hairy woman, a bald-headed woman, and a "two-timin' " woman. Roy Orbison's pretty woman becomes akin to "Cousin It," the ugly, bit character featured on the TV series "The Addams Family." The physical attributes of the subject woman deviate from a pleasing image of feminity to bald-headed, hairy and generally repugnant. To complete the thematic twist, at the end of the parody the "two-timin' " woman turns out to be pregnant. The phrase, "the baby ain't mine" is completely inconsistent with the tone and story of the romantic original. In sum, 2 Live Crew is an anti-establishment rap group and this song derisively demonstrates how bland and banal the Orbison song seems to them. *See MCA, Inc. v. Wilson*, 677 F.2d 180, 185 (2d Cir. 1981) (noting that "if the copyrighted [work] is not at least in part an object of the parody, there is no need to conjure it up"); Defendant's Affidavits of Oscar Brand and William Krasilovsky.

The parody also employs a number of musical devices that exaggerate the original and help to create a comic effect. 2 Live Crew uses the same drum beat and bass riff to start its song. But unlike the original, only five seconds into the song and immediately following the bass riff, 2 Live Crew inserts a heavily distorted "scraper," indicating a significant disparity in style. The same scraper is used four seconds later to reiterate that message and subsequently at the end of the song as well. Also at the beginning of the parody, the first soloist sings in a different key than the chorus. In addition, four times during the parody, 2 Live Crew repeats Orbison's bass riff over and over again, double the number of times on the original, until the riff begins to sound like annoying scratch on a record.

Although the Court has determined that 2 Live Crew's version parodies the original, a finding of a parody does not necessarily equate with a finding of fair use. *Fisher,* 794 F.2d at 435. "Parody was not classified as a presumptively fair use . . . . Each assertion of the 'parody defense' must be considered individually, in light of the statutory facts, reason, experience, and of course, the general principles developed in past cases." *Id.* As a result, the Court will examine the remaining three statutory elements of § 107.

2. *Nature of the Copyrighted Work.* the second factor is the nature of the copyrighted work. In addressing this element, "the court may consider, among other things, whether the work was creative, imaginative, and original, . . . and whether it represented a substantial investment of time and labor made in anticipation of financial return." *MCA,* 677 F.2d at 182 (citation omitted). *See also Harper & Row,* 471 U.S. at 563; 3 M. Nimmer, *Nimmer on Copyright,* § 13.05[A] at 13-78. Since "Oh, Pretty Woman" is a published work, with creative roots, this factor weighs in favor of the plaintiff.

3. *Amount of Quotation.* The third factor to address is the amount and substantiality of the portion used in relation to the copyrighted work as a whole. This element contains quantitative and qualitative elements and as a result the amount of protected material that a copier may take under the rubric of fair use will vary from case to case.

For instance, fair use may not allow a person to copy the most qualitatively "valuable" portion of the work, even if such portion constitutes a relatively small amount of the entire protected material. *See, e.g., Harper & Row,* 471 U.S. at 565-66. In *Harper & Row* the Supreme Court noted that a taking that is "insubstantial with respect to the infringing work" does not necessarily mean that

fair use applies. *Id.,* 471 U.S. at 565. By contrast, "the copying of an entire work does not preclude fair use *per se.*" *Hustler Magazine, Inc., v. Moral Majority Inc.,* 796 F.2d 1148, 1155 (9th Cir. 1986).

Acuff-Rose argues that the portions taken from "Oh, Pretty Woman" are both qualitatively and quantitatively significant. According to the plaintiff's musicologist, Earl V. Spielman, the two works are substantially similar. The copying includes the name of the song and key lyrics. The 2 Live Crew version also includes the same guitar refrain, opening drum beat and melody and chorus. Affidavit of Earl V. Spielman. Since the original song is so popular, Acuff-Rose contends that 2 Live Crew does not need to copy much of the original in order to conjure up its memory.

But the conclusions drawn by the plaintiffs does not address whether 2 Live Crew used more of the copyrighted work than was necessary to recall or conjure up "Oh, Pretty Woman." *See, e.g., Fisher,* 794 F.2d at 438 n.4 (holding that affidavits conflicting on question of substantiality are irrelevant given that issue of extent of taking is a question of law). No one disputes that 2 Live Crew copied "Oh, Pretty Woman." But the question about substantial similarity cannot be divorced from the purpose for which the defendant's work will be used.

It is a settled aspect of copyright law that paradists have the right to conjure up the object of the parody. In *Berlin,* 329 F.2d 541, the court stated that where "the parody has neither the intent nor the effect of fulfilling the demand for the original, and where the parodist does not appropriate a greater amount of the original work than is necessary to 'recall or conjure up' the object of his satire, a finding of infringement would be improper." *Id.* at 545. *See Elsmere Music, Inc. v. National Broadcasting Co.,* 623 F.2d 252,

253 (2d Cir. 1980) ("parody frequently needs to be more than a fleeting evocation of an original in order to make its humorous point"). Indeed, the effectiveness of a parody inherently depends on its ability to copy the original work.

Several courts that have balanced the conflict between the rights of the copyright owner against the goals of the parodist have concluded that parodies of songs require more leeway than other types of parodies. The Ninth Circuit reasoned in *Fisher* that resolution of the substantiality question depends on the medium of the respective works. In *Fisher*, the plaintiffs sued for copyright infringement of a song entitled "When Sunny Gets Blue." As in this case, the plaintiffs previously had denied defendant Dees' request to record a parody of the original. Nonetheless, Dees released his parody song "When Sonny Sniffs Glue," copying the musical theme of the original while changing the lyrics. *Id.* at 434. The *Fisher* court observed that:

> Like a speech, a song is difficult to parody effectively without exact or near-exact copying. If the would-be parodist varies the music or meter of the original substantially, it simply will not be recognizable to the general audience. This "special need for accuracy," provides some license for "closer" parody. . . . To be sure, that license is not limitless: the parodist's desire to make the best parody must be "balanced against the rights of the copyright owner in this original expression."

Fisher, 794 F.2d at 439 (citations omitted). Likewise, in *Berlin*, the Second Circuit affirmed the application of the fair use defense in a case where the defendants, publishers of "Mad Magazine," had

published a volume which parodied twenty-five of the plaintiff's song lyrics in same meter. "The disparaties in theme, content and style between the original lyrics and the alleged infringements could hardly be greater." *Berlin*, 329 F.2d at 545. *Cf. Walt Disney Productions v. Air Pirates*, 581 F.2d 751, 758 (9th Cir. 1978) (holding that fair use defense cannot apply where the copying is virtually complete or almost verbatim and that parodist may only use what is necessary to conjure up the original), *cert. denied*, 439 U.S. 1132 (1979); *MCA*, 677 F.2d at 185 (holding that where defendant's song "Cunnilingus Champion of Co. C" did not parody plaintiff's song "Boogie Woogie Bugle Boy of Company B," the amount copied by defendants from the original song was so substantial as to be unfairly excessive).

In this case, 2 Live Crew has not mimicked so much of "Oh, Pretty Woman" that it runs afoul of the substantiality factor. Notable aspects of the original song are plainly present in 2 Live Crew's version but, unlike *Air Pirates*, this is not a case of virtually complete or verbatim copying. Rather this case falls in the realm of parodies envisioned by *Fisher* and *Berlin*. In view of the fact that the medium is a song, its purpose is parody, and the relative brevity of the copying, it appropriates no more from the original than is necessary to accomplish reasonably its parodic purpose. *Fisher*, 794 F.2d at 439.

4. *Effect on the Market.* Finally, as discussed in the first statutory factor under § 107, the Court must examine the effect of the use upon the potential market for or value of the copyrighted work. The Supreme Court has referred to the fourth factor as "the single most important element of fair use." *Harper & Row*, 471 U.S. at 566. *Accord Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1175 (5th Cir. 1980).

The Supreme Court reasoned that this element should be weighed most heavily since "a use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author's incentive to create." *Sony Corp.*, 464 U.S. at 450. As a result, fair use, "when properly applied, is limited to copying by others which does not materially impair the marketability of the work which is copied." *Harper & Row*, 471 U.S. at 566-67 (quoting 1 Nimmer, *Nimmer on Copyright*, § 1.10[D] at 1-87). The Court emphasized that to deny a finding of fair use, one need show only that if the defendant's use " 'should become widespread, it would adversely affect the *potential* market for the copyrighted work.' " *Harper & Row*, 471 U.S. at 568 (quoting *Sony Corp.*, 464 U.S. at 451).

Neither *Harper & Row* nor *Sony* involved a parody. But in *Fisher*, which involved a copyright infringement claim and a parody defense, and the Ninth Circuit held that the parody "When Sonny Sniffs Glue" had no cognizable economic impact on the original song. "When Sunny Gets Blue." It concluded that commercial substitution was unlikely, remarking that:

> "When Sunny Get Blue" is a "lyrical song concerning or relating to a woman's feelings about lost love and her chance for .... happiness again." By contrast, the parody is a 29-second recording concerning a woman who sniffs glue, which "ends with noise and laughter mixed into the song." We do not believe that consumers desirous of hearing a romantic and nostalgic ballad such the composers' song would be satisfied to purchase the parody instead.

> Nor are those fond of parody likely to consider "When Sunny Gets Blue" a source of satisfaction. The two works do not fulfill the same demand.

Fisher, 794 F.2d at 438. *See also, Consumers Union of United States, Inc. v. General Signal Corp.*, 724 F.2d 1044, 1051 (2d Cir. 1983) ("Where the copy does not compete in any way with the original . . . concern is absent."), *cert. denied*, 469 U.S. 823 (1984); *Elsmere Music*, 482 F. Supp. 741, 746-47 (S.D.N.Y.), *aff'd*, 623 F.2d 252 (2d Cir. 1980) (although defendants appropriated the heart of plaintiff's song, since the copying was a parody it could not fulfill demand for the original version). *Cf. New Line Cinema Corp. v. Bertlesman Music Group*, 693 F. Supp. 1517, 1528 (S.D.N.Y. 1988) (parody defense rejected where defendant's rap video would be likely to harm the value of carefully planned derivative use of plaintiff's movie in the rap video market).

With respect to the parody "Pretty Woman," this fourth factor favors the defendants. As in *Fisher*, it is extremely unlikely that 2 Liv Crew's song could adversely affect the market for the original. The intended audience for the two songs is entirely different. The odds of a record collector seeking the original composition who would also purchase the 2 Live Crew version are remote. Defendant's Affidavit of William Krasilovsky. "The group's popularity is intense among the disaffected, definitely not the audience for the Orbison song. I cannot see how it can affect the sales or popularity of the Orbison song. I cannot see how it can affect the sales or popularity of the Orbison song, except to stimulate interest in the original." Defendant's Affidavit of Oscar Brand. Second, while Acuff-Rose is not required to prove damages, *Marcus v. Rowley*, 695 F.2d 1171, 1177 (9th Cir. 1983), it has not produced convincing evidence that any harm to any existing or potential market has occured. *Cf. Harper & Row*, 471

U.S. at 567 (where trial court found an actual effect on the market). On a motion for summary judgment, the nonmoving party cannot rest on its pleadings, but must present some "specific facts showing that there is a genuine issue for trial." *Celotex Corp.*, 477 U.S. at 324. Acuff-Rose must adduce more than a scintilla of evidence to overcome the motion. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989).

Plaintiffs attempt to focus on their possible future losses and mount two different arguments. First, they contend that 2 Live Crew's parody prevents them from marketing future derivative works, such as a rap version or even their own "burlesque" of the Orbison original. Second, they argue that "Oh, Pretty Woman" "has been tarnished by being associated with these lyrics and with 2 Live Crew" and that will result in the loss of future licensing arrangements.

Since 2 Live Crew's version of "Oh, Pretty Woman" is a parody, that release has not prevented Acuff-Rose from recording whatever version of the original it desires. Likewise, plaintiff's argument that it would be prevented from releasing a parody of their work is meritless. In a world where copyright monopoly stretched to that great extent, parodies would be unlikely ever to be approved by the original author. *See* 3 Nimmer, *Nimmer on Copyright*, § 13.05[C] at 13-90.12; *Fisher*, 794 F.2d at 437 ("Parodists will seldom get permission from those whose works are parodied. . . . The parody defense to copyright infringement exists precisely to make possible a use that generally cannot be bought.")

Examining the latter argument, several courts have discounted attempts by copyright holders to claim infringement based on the impact of alleged criticism. "In assessing the

economic effect of the parody, the parody's critical impact must be excluded. Through its critical function, a 'parody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically'. . . . Biting criticism suppresses demand; copyright infringement usurps it." *Fisher*, 794 F.2d at 437-38 (citations omitted). *Also see Consumers Union*, 724 F.2d at 1050-51; *Pillsbury Co. v. Milky Way Productions, Inc.*, 215 U.S.P.Q. 124, 131 (N.D. Ga. 1981).

III.

Having applied § 107's four factor, the Court finds that they weigh in favor of he defendants. 2 Live Crew's "Pretty Woman" is a parody. Its purpose is to poke fun at the original version of "Oh, Pretty Woman." In so doing, the parody copies from the original. Notwithstanding the copying needed to conjure up the original song, for the foregoing reasons the Court concludes that 2 Live Crew's use of the original copyrighted song is protected fair use.

IV.

Defendants also argue that plaintiff's state law claims for interference with business relations and interference with prospective business advantage for the performance and distribution of a copy of "Oh, Pretty Woman" are preempted by § 301 of the Copyright Act. 17 U.S.C. § 301 describes the extent to which the Copyright Act preempts state law causes of action based on copyright. It provides in pertinent part:

> (a) On and after January 1, 1978 all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of

copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103 ... are governed exclusively by this title. Thereafter no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to—

> (3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106.

A two-part test determines when § 301(a) preempts at common law tort claim. "First, the work in which the right is asserted must be fixed in tangible form and come within the subject matter of copyright as specified in [17 U.S.C. § 102]. Second, the right must be equivalent to any of the rights specified in [17 U.S.C. § 106]." *Baltimore Orioles v. Major League Baseball Players Assn.*, 805 F.2d 663, 674 (7th Cir. 1986), *cert. denied*, 480 U.S. 941 (1987). *See also Harper & Row Publishers, Inc., v. National Enterprises*, 723 F.2d 195, 199-200 (2d Cir. 1983), *rev'd on other grounds*, 471 U.S. 539 (1985).

In this case, Acuff-Rose focuses on the second factor of the § 301 analysis. It argues that the tort claim is not "equivalent to "

the rights set forth in § 106. A right under state law is equivalent if it creates or destroys any of the rights contained in Copyright Act. *Id.* at 676; *Allied Artists Pictures Corp. v. Rhodes*, 679 F.2d 656, 662-63 (6th Cir.), *aff'g in pertinent part*, 496 F. Supp. 404, 443-44 (S.D. Ohio 1980). Section 106 of the Copyright Act grants plaintiffs the exclusive right to reproduce, distribute, perform and display the copyrighted work, "Oh, Pretty Woman."[5]

---

5. Section 106 of the Copyright Act provides:

> Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
>
> (1) to reproduce the copyright work in copies or phonorecords;
>
> (2) to prepare derivative works based upon the copyrighted work;
>
> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
>
> (4) in the case of literary, musical, dramatic, or choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
>
> (5) in the case of literary, musical, dramatic, or choreographic works, pantomimes, and pictorial, graphic or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyright work publicly.

Appendix B

With respect to Acuff-Rose's claim for interference with business relationships, Tennessee common law provides that "[O]ne's business is entitled to protection 'from tortious interference by a third person who, in interfering therewith, is not acting in the exercise of some right, such as the right to compete for business.' " *Lann v. Third National Bank*, 198 Tenn. 70, 72, 277 S.W.2d 439, 440 (1955). To prevail on such a claim, the plaintiff must show malice, ill will, or wrongful motive. *Id. See also Testerman v. Tragesser*, 789 S.W.2d 553, 556-57 (Tenn. App. 1989) (citing *Lann*). Plaintiff alleges that it has lost benefits flowing from its copyright monopoly. Like the copyright infringement claim, violation of the state law claim rests on a finding of unauthorized copying. "In both cases, it is the act of unauthorized publication which causes the violation. The enjoyment of benefits from derivative use is so intimately bound up with the right itself that is could not possibly be deemed a separate element. . . ." *Harper & Row*, 723 F.2d at 201. In addition, the fact that the state law cause of action requires proof of intent does not necessarily preclude a finding of preemption. The Second Circuit concluded in *Harper & Row* that:

> [T]he fact that cross-appellants pleaded additional elements of awareness and intentional interference, not part of a copyright infringement claim goes merely to the scope of the right; it does not establish qualitatively different conduct on the part of the infringing party, nor a fundamental nonequivalence between the state and federal rights implicated.

Id. Since the claim is equivalent to rights established by § 106 the cause of action is preempted by federal law. *See also, Gemcraft Homes, Inc. v. Sumurdy*, 688 F. Supp. 289, 295 (E.D. Tex. 1988) (holding that plaintiff's claim for tortious interference with

Appendix B

contractual relations is preempted by § 301); *Pacific & Southern Co., Inc. v. Satellite Broadcast Networks, Inc.*, 694 F. Supp. 1565, 1572-73 (N.D.Ga. 1988) (same); *McNabb Bennett & Associates, Inc. v. Terp Meyers Architects*, No. 85-C-8792, (N.D. Ill. June 19, 1986) (available on Westlaw) (same).

The question about whether § 301 preempts any Tennessee tort for interference with prospective business advantage is trickier. The plaintiff has not cited any Tennessee case in which recovery was allowed for wrongful interference not involving a breach of contract, and it appears that Tennessee has not developed any significant body of law in this area. *Warde v. Kaiser*, 887 F.2d 97, 103 n.1 (6th Cir. 1989) (citing *Cesnik v. Chrysler Corp.*, 490 F Supp. 859, 874 (M.D. Tenn. 1980) (Wiseman, J.)).

Even assuming arguendo that interference with prospective business advantage constitutes a separate tort under Tennessee law, such a cause of action is nevertheless preempted by federal law. As the Court found for the interference with business relationship claim, this second tort is equivalent to the rights specified in 17 U.S.C. § 106 and thus is preempted by federal law as well. *See e.g, Motown Record Corp. v. George A. Hormel & Co.*, 657 F. Supp. 1236, 1240 (C.D. Cal. 1987) (holding that plaintiff's claim for tortious intereference with prospective business advantage is preempted by § 301).

s/ Thomas A. Wiseman
THOMAS A. WISEMAN, JR.
CHIEF JUDGE

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

3:90-0524

ACUFF-ROSE MUSIC, INC.

v.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, CHRISTOPER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVIS HOBBS a/k/a Mr. Mixx, p/k/a THE 2 LIVE CREW and LUKE SKYYWALKER RECORDS

ORDER

For the reasons stated in the accompanying Memorandum, the Motion for Summary Judgment made by defendants 2 Live Crew and Luke Skyywalker Records against plaintiff Acuff-Rose Music, Inc. is granted pursuant to Rule 56 of the Federal Rules of Civil Procedure. 2 Live Crew's rendition of "Prety Woman" is a parody of the original "Oh, Pretty Woman" that constitutes fair use under 17 U.S.C. § 107 of the Copyright Act, 17 U.S.C. §§ 101-914 (1982). *See, e.g., Fisher v. Dees*, 794 F.2d 432, 436 (9th Cir. 1986).

The two Tennessee state law claims for interference with business relations and interference with prospective business advantage for the performance and distribution of a copy of "Oh, Pretty Woman" are preempted by 17 U.S.C. § 301.

IT IS SO ORDERED.

s/ Thomas A. Wiseman
THOMAS A. WISEMAN, JR.
CHIEF JUDGE

APPENDIX C — COMPLAINT FILED JUNE 18, 1990 WITH EXHIBITS

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE, TENNESSEE

Case No. 3 90 0524

ACUFF-ROSE MUSIC, INC.

Plaintiff,

v.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx

p/k/a
THE 2 LIVE CREW

and

LUKE SKYYWALKER RECORDS,

Defendants.

JURY DEMAND
JUDGE WISEMAN

COMPLAINT

This is an action for copyright infringement and tortious interference with business relationships and prospective business advantage. In support of its complaint, Plaintiff states:

Appendix C

PARTIES

1. Plaintiff Acuff-Rose Music, Inc., is a Tennessee corporation. Plaintiff maintains offices and does business in the Middle District of Tennessee.

2. Defendants Luther Campbell, a/k/a Luke Skyywalker, Christopher Wongwon, a/k/a Fresh Kid Ice, Mark Ross, a/k/a Brother Marquis, and David Hobbs, a/k/a Mr. Mixx, on information and belief are residents of the State of Florida.

3. These individuals make up a "rap" music group known professionally as The 2 Live Crew. The group does business and may be found in the Middle District of Tennessee.

4. Defendant Skyywalker Records is a corporation organized under the laws of the State of Florida, with its principal place of business in Miami, Florida. Skyywalker Records does business and may be found in the Middle District of Tennessee.

JURISDICTION AND VENUE

5. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1338, 1331, and 1332 and the doctrine of pendant jurisdiction.

6. Venue lies in this district pursuant to 28 U.S.C. § 1400(a) .

FACTS

7. Roy Orbison and William Dees were the co-authors of an original musical work entitled "Oh, Pretty Woman."

8. The musical work "Oh, Pretty Woman" contains subject

Appendix C

matter copyrightable under the laws of the United States.

9. Roy Orbison and William Dees assigned their rights in "Oh, Pretty Woman" to Acuff-Rose Music, Inc. in 1964.

10. Acuff-Rose's predecessor registered "Oh, Pretty Woman" for copyright protection on August 26, 1964, under Copyright Registration No. EP-191739.

11. The copyright registration in "Oh, Pretty Woman" was acquired by Opryland USA Inc. in 1985.

12. Plaintiff has complied with all of the requirements of the copyright laws of the United States and now holds the copyright to "Oh, Pretty Woman."

13. "Oh, Pretty Woman" was a hit when it was first recorded and has remained a popular work. Plaintiff receives frequent requests to license "Oh, Pretty Woman," and the revenues from domestic and foreign licensing have been and continue to be substantial. Plaintiff has zealously protected the copyright in "Oh, Pretty Woman" and has only granted licenses that were consistent with good taste and that furthered the value of the copyright. License requests are evaluated for their consistency with Plaintiff's long range plans for exploitation of the copyrighted work. Requests for licenses that either are not consistent with good taste or would disparage the future value of the copyright are denied.

14. "Oh, Pretty Woman" has been frequently recorded and widely disseminated both by Plaintiff's predecessors in interest and by Plaintiff's licensees. Defendants had access to "Oh, Pretty Woman."

15. On July 5, 1989, Defendants wrote a letter to Plaintiff, requesting a license to create a derivative work from "Oh, Pretty Woman" for an upcoming album. The work was to be performed, manufactured, and distributed, both live and on commercially available record albums, tapes, and compact discs. On information and belief, various other uses were contemplated, including, but not limited to, distribution of the work as a single and as a music video.

16. On July 17, 1989, Plaintiff informed Defendants by letter that the license would not be granted. Exhibit A.

17. On or about July 15, 1989, Defendants released a record album entitled *As Nasty As They Wanna Be*. The album contained numerous sexually explicit lyrics.

18. Also on or about July 15, 1989, Defendants released a record album entitled *As Clean As They Wanna Be*. This album contains six of the 18 songs on *As Nasty As They Wanna Be*. In addition, *As Clean As They Wanna Be* contains four songs that did not appear on the *As Nasty As They Wanna Be* album.

19. One of the new songs on *As Clean As They Wanna Be* is a derivative work based on Plaintiff's copyrighted work "Oh, Pretty Woman."

20. Both the album cover and the label copy list the title of the song as "Pretty Woman" and state that it was "Written By: Roy Orbison and William Dees" and published by "Acuff-Rose (BMI)." A copy of the label information from the compact disc copy of *As Clean As The Wanna Be* is attached as Exhibit B.

21. The music used on the song "Pretty Woman is substantially similar to "Oh, Pretty Woman" in melody. In

addition, the first verse of "Pretty Woman" is substantially similar to the first verse of "Oh, Pretty Woman". The unauthorized new lyrics created by Defendants for "Pretty Woman" are disparaging and therefore not consistent with maintaining the value of the copyright in "Oh, Pretty Woman." A transcription of the lyrics of "Pretty Woman" from *As Clean As They Wanna Be* is attached as Exhibit C. A copy of "Oh, Pretty Woman," as recorded by Roy Orbison, is attached as Exhibit D. A copy of "Pretty Woman," as it appears on the album *As Clean As They Wanna Be*, is attached as Exhibit E.

22. Plaintiff recently became aware of the Defendants' unauthorized use of "Oh, Pretty Woman."

23. On information and belief, Defendants are continuing to make use of "Oh, Pretty Woman," both in album and related sales and in live performances.

COUNT I

Copyright Infringement

24. Defendants have willfully infringed and commercially exploited Plaintiff's copyright in "Oh, Pretty Woman" by producing, manufacturing, distributing, and performing an unauthorized derivative work — their recording of "Pretty Woman" — that was copied from Plaintiff's copyrighted work, "Oh, Pretty Woman," and that was not licensed by Plaintiff.

COUNT II

Interference with Business Relationships

25. By their unlicensed copying and commercial

exploitation of "Oh, Pretty Woman," Defendants have intentionally interfered with Plaintiff's business relationships with copyright licensees who have lawfully licensed the right to use "Oh, Pretty Woman."

COUNT III

Interference with Prospective Business Advantage

26. By their unlicensed copying and commercial exploitation of "Oh, Pretty Woman," Defendants have intentionally interfered with Plaintiff's prospective business advantage in licensing future users of "Oh, Pretty Woman." In addition, Defendants have made disparaging unlicensed uses of "Oh, Pretty Woman." These uses have significantly lessened the value of licensing rights for "Oh, Pretty Woman", are not in good taste, and are detrimental to future attempts by Plaintiff to exploit the work by making it undesirable to future licensees.

RELIEF

WHEREFORE, Plaintiff prays that:

1. A date for a trial of the foregoing action be set.

2. Plaintiff be awarded either its actual damages plus Defendants' profits that resulted from their infringement of Plaintiff's copyright or the statutory damages for willful infringement, whichever is greater.

3. Plaintiff be awarded damages for Defendants' tortious interference with Plaintiff's business relationships and with Plaintiff's prospective business advantage.

4. Defendants forfeit all copies of *As Clean As They Wanna Be*, including all masters, tapes or other means by which *As Clean As They Wanna Be* can be reproduced.

5. Plaintiff be granted temporary and permanent injunctive relief.

6. Plaintiff be awarded its costs and reasonable attorneys' fees.

7. Plaintiff receive such other, further relief, both legal and equitable, as is just.

Respectfully submitted,

Of Counsel:

s/ Hal Willis / by EBM
Hal Willis

ACUFF-ROSE MUSIC, INC.

KING & BALLOW

By: s/ Elizabeth B. Marney
Alan L. Marx
E. Andrew Norwood
Elizabeth B. Marney
F. Casey Del Casino

1200 Noel Place
200 Fourth Ave. North
Nashville, TN 37219
(615) 259-3456

Attorneys for Plaintiff
Acuff-Rose Music, Inc.

Appendix C

EXHIBIT A — LETTER OF JULY 17, 1989

OPRYLAND MUSIC GROUP

ACUFF-ROSE MUSIC, INC.

MILENE MUSIC, INC.

July 17, 1989

Linda Fine
General Manager
SKYWALKER RECORDS
Suite 307
3050 Biscayne Blvd.
Miami, FL 33137

Dear Linda:

In response to your letter of July 5, 1989 regarding "Oh, Pretty Woman", I called your office, but was unable to contact you.

I am aware of the success enjoyed by "The 2 Live Crews", but I must inform you that we cannot permit the use of a parody of "Oh, Pretty Woman".

Sincerely,

s/ Gerry Teifer
Gerry Teifer

GT/jmm

Appendix C

EXHIBIT B — ALBUM COVER AND LABEL INFORMATION

(Omitted Here But Submitted Separately As Lodging Appendix)

Appendix C

EXHIBIT C — TRANSCRIPTION OF LYRICS AS RECORDED BY 2 LIVE CREW

PRETTY WOMAN
(OH PRETTY WOMAN) AS RECORDED BY 2 LIVE CREW

PRETTY WOMAN WALKIN' DOWN THE STREET
PRETTY WOMAN GIRL YOU LOOK SO SWEET
PRETTY WOMAN YOU BRING ME DOWN TO THAT KNEE
PRETTY WOMAN YOU MAKE ME WANNA BEG PLEASE
OH, PRETTY WOMAN

BIG HAIRY WOMAN YOU NEED TO SHAVE THAT STUFF
BIG HAIRY WOMAN YOU KNOW I BET IT'S TOUGH
BIG HAIRY WOMAN ALL THAT HAIR IT AIN'T LEGIT
'CAUSE YOU LOOK LIKE 'COUSIN IT'
BIG HAIRY WOMAN

BALD HEADED WOMAN GIRL YOUR HAIR WON'T GROW
BALD HEADED WOMAN YOU GOT A TEENY WEENY AFRO
BALD HEADED WOMAN YOU KNOW YOUR HAIR COULD LOOK NICE
BALD HEADED WOMAN FIRST YOU GOT TO ROLL IT WITH RICE
BALD HEADED WOMAN HERE, LET ME GET THIS HUNK OF BIZ FOR YA
YA KNOW WHAT I'M SAYING YOU LOOK BETTER THAN RICE A RONI
OH BALD HEADED WOMAN

Appendix C

BIG HAIRY WOMAN COME ON IN
AND DON'T FORGET YOUR BALD HEADED FRIEND
HEY PRETTY WOMAN LET THE BOYS
JUMP IN

TWO TIMIN' WOMAN GIRL YOU KNOW YOU AIN'T RIGHT
TWO TIMIN' WOMAN YOU'S OUT WITH MY BOY LAST NIGHT
TWO TIMIN' WOMAN THAT TAKES A LOAD OFF MY MIND
TWO TIMIN' WOMAN NOW I KNOW THE BABY AIN'T MINE
OH, TWO TIMIN' WOMAN

OH PRETTY WOMAN

Appendix C

EXHIBIT D — AUDIO TAPE

(Omitted Here But Submitted Separately As Lodging Appendix)

Appendix C

EXHIBIT E — AUDIO TAPE

(Omitted Here But Submitted Separately As Lodging Appendix)

APPENDIX D — AFFIDAVIT OF OSCAR BRAND SWORN TO JULY 31, 1990 WITH EXHIBITS

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ACUFF-ROSE MUSIC, INC.,

Plaintiff,

vs.

LUTHER R. CAMPBELL, a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx

p/k/a
THE 2 LIVE CREW

and

LUKE SKYYWALKER RECORDS,

Defendants.

AFFIDAVIT OF OSCAR BRAND

STATE OF NEW YORK)

COUNTY OF NASSAU)

Comes now the Affiant and makes oath as follows:

1. I am Oscar Brand, a citizen and resident of Great Neck, New York. I am over the age of 18 years of age.

2. I am the Curator of the Songwriters Hall of Fame. I am the Editor of "Words About Music" for the National Academy of

Appendix D

Popular Music. I am the Host of "The Folksong Festival," a radio program which has broadcast since 1945 on New York's Public Radio Station WNYC. I am a composer and writer on subjects in the field of popular music.

3. I have been on the faculty of Hosftra University and the New School, lecturing on the subject of folk music, the musical theatre, andAmerican history as revealed in the popular music of the day. I have written books, including *Songs of '76*, (Evans-Lippincott), *The Ballad Mongers*, (Funk and Wagnalls), *The Bawdy Song*, (Grove - Dorchester), *Singing Holidays*, (Knopf), *When I First Came To This Land*, (Dutton), and numerous folios and song collections. As the artist on 85 LPs, videotapes, CD's videotapes, and audiocassetts, I have recorded many parodies of popular songs in such albums as "Tell It To The Marines," "Every Inch A Sailor," "Pie In The Sky," "The Wild Blue Yonder," "Laughing America," "Campaign Songs of the U.S.," etc. As the author of books and folios on the subject of folk and popular music, I have studied the use of parody and satire in American culture. On my radio shows for CBS, NBC, and WNYC, I have often broadcast entire programs on the subject of parodies and satires on popular songs, including a July 29, 1990 airing. As a writer-composer of popular songs, I have often heard many of my own compositions, such as "A Guy Is A Guy," "When I First Came To This Land," "My Old Man's A Sailor," etc. used as parodies and satires.

5. I have been asked to examine the merits of this case, in which a parody of the Roy Orbison - William Dees song, "Oh, Pretty Woman," has been recorded with the title "Pretty Woman" by the group called 2 Live Crew. For the reasons cited abve, I believe I can discuss this subject with complete expertise.

6. In my opinion, both the words and the music of the 2 Live Crew performance are classic parodies.

Appendix D

THE MUSIC

7. The Orbison recording of "Oh, Pretty Woman" begins with a 4/4 drum beat and a very recognizable "bass riff," (Numbers 1, 2, 3, 4). Attached as **Exhibit 1** to my Affidavit is the music chart of "Oh, Pretty Woman" is F Major. The 2 Live Crew version begins with the same drum beat and the recognizable riff. The 2 Life Crew recording is essentially a musical joke, because the riff is followed by an atypical scraper — a Latin musical device, quite antithetic to the Orbison musical styling.

8. As in the Orbison recording, (6, 7, 8, 9, 10), the 2 Live Crew chorus sings the "Pretty Woman" chorus in the key of A major. But, the first soloist on the 2 Live Crew recording proceeds to sing in the key of B major, which, performed against the A major chorus, gives the song a comic aspect. Next, Orbison sings a refrain, (11, 12, 13, 14, 15). This refrain is ignored by 2 Live Crew, who repeat the "Pretty Woman" chorus. Then, in order to remind the listener that Orbison's song is the butt of the joke, the "bass riff" is repeated *eight times* by the 2 Live Crew musicians.

9. The second soloist for 2 Live Crew stays close to Orbison's original melody (19, 20, 21, 22, 23, 24), which makes the altered lyrics seem even more comic. However, once again, the 2 Live Crew soloist ignores the refrain, (25, 26, 27, 28, 29). He also ignores Orbison's following development (from 30 to 58), instead repeating the "Pretty Woman" chorus with comic words.

10. At the end of the 2 Live Crew recording, the bass riff is repeated, subtly changed by the dropping of one measure, another musical joke Finally, the inappropriate scraper is again added to the riff to close the song,

11. *I*n sum, the music on 2 Live Crew's"Pretty Woman" uses

Appendix D

just enough material from the Orbison composition to create a very sophisticated comic parody of the original song.

THE LYRICS

12. The essence of parody is in its play on words. Altering the expected is the key to its humor. The revised form must stay close enough to the original to make comic the sudden twist — the substitution of new words for the familiar.

13. It is for that reason, that the popular song has throughout our history been the vehicle for satire and parody. As I pointed out in my book *Songs of '76*, our first parodies were based on old ballads and folk songs. The American Revolution was fought with re-writes as well as with guns. Nowadays, our popular music parodies are more likely to be comic variations of Beatles songs, Dylanesque laments, and, more recently, Rock and Roll "Strike-offs" of such artists as Chuck Berry and Madonna.

14. On July 29, 1990, I broadcast one of many public radio programs on the subject of parody, using songs performed at the 90th Annual Legislative Correspondents' Association dinner in Albany, New York. Senator Al D'Amato sang a parody of the copyrighted song "It's A Sin To Tell A Lie."

> "Be sure, it's true when you write a headline.
> It's a sin to tell a lie.
> Many a pol has been broken.
> Because The New York Times has spoken."

Another parody featured on the show was a sci-fi version of the copyrighted song "Casey Jones," printed with many others in the *Canadian Folksong Bulletin*, (June - 1989):

"Come all ye spacemen, if you want to hear,
The story of a great planeteer.
Spacey Jones was the pilot's name,
On a fuel-burning rocket, boys, he won his fame."

Merle Travis' "16 Tons" as parodied as "The Schoolteacher's Lament," ending with the words, "I owe my soul to the P.T.A."

15. Parodies have never interfered with the popularity of the original. "The Star Spangled Banner" was altered a thousand times but persisted for over a century as written by Francis Scott Key. The sales graph of "Hello, Dolly" didn't change when it became "Hello, Lyndon," and "Hello, Nixon." Hundreds of popular songs have been "covered" by parody performances and recordings without altering their popular appeal or interfering with their sales. The original song is used because it *is* popular and is so recognizable as to make the alterations more humorous. This is especially true in the case of Afro-American music, of which "rap" is a prime example, being derived from the old "talking blues" form. In talking blues and rap music, parody is often used for protest and satire,. New works are substituted which make fun of the "white-bread originals an the establishment without, in any way, compromising the integrity of the original.

16. In the case of 2 Live Crew's "Pretty Woman" it seems obvious that this anti-establishment singing group is trying to show how bland and banal the Orbison song seems to them. It's just one of many examples of their derisive approach to "white-centered" popular music. They change the lyric "pretty woman" to "bald-headed woman," which is 100% pure parody.

17. Parody often changes the message of the original so that it becomes bawdy and sexist. The Orbison lyric invites the pretty

woman to "Come with me, baby, be mine tonight." The 2 Live Crew version makes the "pretty woman" into a "big hairy woman who ought to shave that stuff." And at the close of 2 Live Crew's version she turns out to be pregnant.

CONCLUSION

18. There is no question in my mind that the song "Oh, Pretty Woman" by Roy Orbison and William Dees was intended for Mr. Orbison's country music audience and middle-America.

19. On the other hand, 2 Live Crew's versions, which is unquestionably a comic parody, is aimed at the large black populace which used to buy what was once called "race" records. The group's popularity is intense among the disaffected, definitely not the audience for the Orbison song. I cannot see how it can affect the sales or popularity of the Orbison song, except to stimulate interest in the original.

20. To conclude, it is my belief that parodies such as 2 Live Crew's "Pretty Woman" are vital American artifacts. They should be encouraged and protected. The creative edge which has made American music the envy of the world would greatly suffer if such productions as 2 Live Crew's "Pretty Woman" were in any way curtailed.

s/ Oscar Brand
OSCAR BRAND

Sworn to and subscribed before me
this 31 day of July, 1990.

s/ Michael Drosihn
Notary Public

Appendix D

Respectfully submitted,

s/ Alan Turk
ALAN MARK TURK, S.C. #7342
SANFORD R. ROSS, S.C. #13094
3310 West End Avenue
Fourth Floor
Nashville, TN 37203
(615) 386-9991

ATTORNEYS FOR DEFENDANTS

Appendix D

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been mailed to Elizabeth B. Marney, Attorney for Plaintiff, 100 Noel Place, 200 FourthAvenue, North, Nashville, TN 3719, this 1st day of August, 1990.

s/ Alan Turk
ALAN MARK TURK

Appendix D

EXHIBIT 1 — MUSIC CHART OF "OH, PRETTY WOMAN"

(Omitted Here But Submitted Separately As Lodging Appendix)

APPENDIX E — AFFIDAVIT OF LUTHER CAMPBELL SWORN TO JULY 31, 1990 WITH EXHIBITS

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3 90 0524
JUDGE WISEMAN

ACUFF-ROSE MUSIC, INC.

Plaintiff,

vs.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx

p/k/a
THE 2 LIVE CREW

and

LUKE SKYYWALKER RECORDS,

Defendants.

AFFIDAVIT

STATE OF FLORIDA)
COUNTY OF DADE)

PART I

COMES NOW the Affiant and makes oath as follows:

Appendix E

1. My name is Luther Campbell, and I am a citizen and resident of the State of Florida. I am over the age of eighteen (18) years of age.

2. In May, 1989, I wrote a parody of the song "Oh Pretty Woman" which I entitled "Pretty Woman". In writing the parody I felt it was necessary for the listener to identify the parody version with the original version written and performed by the late Roy Orbison. In writing the lyrics to the parody and selecting the accompanying *score* it was a critical factor that I determine what amount of the original work would be included in the parody. I chose to include the distinctive introduction of the original version of "Oh Pretty Woman" and the first line of lyrics because I felt this was sufficent for the listeners to identify the parody with the original work.

3. The parody "Pretty Woman" was an attempt on my part, through comical lyrics, to satirize the original work "Oh Pretty Woman", written and performed by Mr. Orbison.

PART II

1. On July 5, 1989, Linda Fine, General Manager of Luke Records f/k/a Luke Skyywalker Records, wrote Gerry [Gary] Teifer of Opryland U.S.A., Inc., and Acuff-Rose Music, Inc. Attached as Exhibit A to my Affidavit is a copy of that correspondence. The purpose of Ms. Fine's letter was to advise Acuff-Rose Music, Inc. of the intent of The 2 Live Crew to write and perform a parody of the song "Oh Pretty Woman" originally written and performed by Roy Orbison, for which Acuff-Rose Music, Inc. held the copyright. Ms. Fine enclosed with her correspondence "a copy of the lyrics, so that you may see their satirical parody, very similar in vein to what Wierd Al Yankovic

Appendix E

and other satirical artists are doing". (Exhibit A) Ms. Fine inducated that Acuff-Rose Music, Inc. would be acknowledged as the owner of the song and that the Defendants would pay the statutory rate for its use. Ms. Fine also indicated that the parody would be included on a novelty record and that it would by "heard by hundreds of thousands of new listeners in their homes". (Exhibit A)

2. On July 17, 1989, Gerry Teifer, of the Opryland Music Group, Inc. and Acuff-Rose, Music, Inc., wrote Linda Fine, General Manager of Luke Records, formerly known as Luke Skyywalker Records. Attached as Exhibit B is a copy of that correspondence. Mr. Teifer, as agent for the Plaintiff, indicated that "I must inform you that we cannot permit the use of a parody of "Oh Pretty Woman". (Exhibit B)

4. In June, 1989, Luke Records, formerly known as Skyywalker Records, released "As Clean As They Want to Be" which included "Pretty Woman" the parody of "Oh Pretty Woman" referenced in Ms. Fine's correspondence attached hereto as Exhibit A.

5. The Defendants did acknowledge Acuff-Rose Music, Inc.'s ownership interest in the song and the authorship of Mr. Orbison and Mr. Dees. Attached as Exhibit C is a photocopy of the compact disc cover which acknowledges these rights of the Plaintiff. "As Clean As They Want To Be" had moderate success in the market place, with combined sales of 248,000 units of albums, cassettes and compact discs. The Plaintiff, as the copyright owner of "Oh Pretty Woman" is entitled to be compensated the statutory rate for the combined sales of albums, cassettes and compact discs. An accounting has been performed by Luke Records, formerly known as Luke Skyywalker Records, to determine the amount of money owed to the Plaintiff. This amount is $13,867.56. Attached

Appendix E

as Exhibit D to my affidavit is a photocopy of a check made payable to the Plaintiff in the amount of $13,867.56 to compensate the Plaintiff for the combined sales of "As Clean As They Want To Be" for the inclusion of the parody "Pretty Woman". This check has been tendered to the Plaintiff through the United States District Court for the Middle District of Tennessee as was originally offered in Ms. Fine's correspondence dated July 5, 1989 (Exhibit A).

6. That all correspondence referenced above was sent to my legal counsel, Allen L. Jacobi who advised me that since the song was a parody that it could be released if so desired.

Further the Affiant sayeth not.

s/ Luther Campbell
LUTHER CAMPBELL

SWORN TO AND SUBSCRIBED BEFORE
ME THIS 31 DAY OF JULY, 1990.

s/ Melanie I. Kerr
NOTARY PUBLIC, State of Florida

Appendix E

EXHIBIT A — LETTER OF JULY 5, 1989

July 5, 1989

Gary Teifer
Opryland, USA
P.O. Box 121900
Nashville, TN 37312-1900

RE: "Pretty Woman"

Dear Mr. Teifer:

As the General Manager of Skyywalker Records, I would like to inform you of "Two Live Crew's" desire to do a parody on the above captioned song.

In the event you have not hear of this group, they are one of the most successful rap groups in the country today. This LP will be their third release and the previous two have gone Gold and are close to Platinum.

At the time of this writing the Group has a cut on the Billboard Rap Chart. I have enclosed a copy of the lyrics, so that you may see their satirical parody, very similar in vain to what Weird Al Yankovic and other satirical artists are doing.

We intend that all credits (writer & publisher) show your complete ownership of the song, and of course we intend to pay statutory rates.

Kindly keep in mind that we present this to you in a humorous sense and in no way should this be construed as anything but a

novelty record that will be heard by hundreds of thousands of new listeners in their homes.

Sincerely,

Linda Fine
General Manager

Encl.
(cassette/lyric sheet)

EXHIBIT B — LETTER OF JULY 17, 1989

OPRYLAND MUSIC GROUP

ACUFF-ROSE MUSIC, INC.

MILENE MUSIC, INC.

July 17, 1989

Linda Fine
General Manager
SKYWALKER RECORDS
Suite 307
3050 Biscayne Blvd.
Miami, FL 33137

Dear Linda:

In response to your letter of July 5, 1989 regarding "Oh, Pretty Woman", I called your office, but was unable to contact you.

I am aware of the success enjoyed by "The 2 Live Crews", but I must inform you that we cannot permit the use of a parody of "Oh, Pretty Woman".

Sincerely,

s/ Gerry Teifer
Gerry Teifer

GT/jmm

Appendix E

EXHIBIT C — ALBUM COVER AND LABEL INFORMATION

(Omitted Here But Submitted Separately As Lodging Appendix)

Appendix E

EXHIBIT D— PHOTOCOPY OF CHECK

(Omitted Here But Submitted Separately As Lodging Appendix)

Appendix E

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been mailed to Elizab eth B. Marney, Attorney for Plaintiff, 1200 Noel Place, 200 Fourth Avenue, North, Nashville, TN 37219, this 1 day of August, 1990.

s/ Alan Turk
ALAN MARK TURK

APPENDIX F — AFFIDAVIT OF WILLIAM KRASILOVSKY SWORN TO JULY 31, 1990 WITH EXHIBIT

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE

Acuff-Rose Music Inc.

Plaintiff

vs.

Luther R. Cambell a/k/a Luke Skywalker, Christopher Wongwon a/k/a Fresh Kid Ice, Mark Ross a/k/a Brother Marquis, David Hobbs a/k/a Mr. Mixx

p/k/a The 2 Live Crew

and Luke Skywalker Records

Defendants

AFFIDAVIT

M. William Krasilovsky, an attorney at law, duly admitted to practice in the states of New York and Alaska and in federal courts affirms upon penalty of perjury as follows:

1. I am an attorney specializing in the field of entertainment law with a particular emphasis upon music copyright. I have been in this field since 1953 and attach hereto as Exhibit "A" my resume.

2. As co-author of the text "This Business of Music" published by the leading trade paper of the music industry, *Billboard*, I have stated the following concerning what is considered to be an "answer song" in the industry and its relationship to the doctrine of "fair use:" (pages 142-145)

Appendix F

> "The music industry has for many years contained "answer songs," which have been common in the country and western and rhythym and blues fields — areas that are now part of the pop music business. An original song might have been entitled, for example, "We always Walk in the Rain." If this should achieve success, another writer might shortly thereafter pen a song called, "We Never Walk in the Rain," as a humorous reply to an aftermath of the former song."

In addition, regarding fair use and parody (page 144):

> "Parody and burlesque of a copyrighted work are dependent on fair use and require caution. Mad Magazine was upheld by a Federal Circuit Court of Appeals in its defense of parodies, such as "The Last Time I Saw Paris," on the ground of fair use for humorous critical purposes. The court's decision pointed out that the copying did not exceed the amount required to recall reasonably and evoke in the reader the original version being parodied. . . ."

Page 143 of "This Business of Music" discusses the precedent of "Jesus Christ Superstar." Applying the factors therein designated, I note most emphatically that 2 Live Crew's work in the instant action cannot be considered a substitute for Plaintiff's work and is not in competition with Plaintiff's work.

3. I have been furnished with authentic copies of the two songs in question in the instant action, namely, "Oh Pretty Woman," as

Appendix F

recorded by Roy Orbison, and "Pretty Woman" as recorded by 2 Live Crew and have made the following observations:

a. The recent recording of 2 Live Crew utilizes an accompaniment throughout and in introductory melodic and lyric segment, which is designed to and accomplishes, an evocation of "Pretty Woman" as recorded by Roy Orbison.

b. It proceeds to parody and satirize the original composition in a true "answer song" format by altering the physical attributes of the subject woman; a pleasing image of feminine beauty becomes bald-headed, hairy and generally repugnant. A particular note is the phrase, "the baby ain't mine" which would be completely inconsistent with the tone and story line of the original song,

c. The widespread publicity and news coverage involving 2 Live Crew, as well as my personal observation from hearing the recording, lead me to the conclusion that the intended audience for the two songs is entirely different. In other words, the record collector seeking the original composition would be highly unlikely to purchase or tune into the 2 Live Crew version.

d. In summary, it appears that the effectiveness of the satire required some evocation of the original, but that the line between infringement and fair use was not exceeded.

e. In presenting this affidavit, I should add the note that I do not purport to be a musicologist or music critic, and that the opinions expressed above are not in such claimed capacity.

s/ M William Krasilovsky
M. William Krasilovsky

Appendix F

Sworn to before me
this 31st day of July, 1990

s/ Andrew J. Feinman
Notary Public

Appendix F

EXHIBIT A — RESUME

M. William Krailovsky, Esq.
51 E. 42nd Street, Suite 1601
New York, New York 10017

M. William Krasilovsky is a partner in the firm of Feinman & Krasilovsky, specializing in music and entertainment matters. In addition to the estates of Rachmaninoff, Buddy De Silva, Ray Henderson and Fats Waller the firm also represents or has represented classic industry figures such as Aretha Franklin, Paul Anka, Burt Bacharach, Chuck Berry as well as numerous composers, publishers, recording artists, producers, studios and record companies. Mr. Krasilovsky has represented Warner Brothers publishing companies and the American Guild of Authors and Composers, has served as officer and/or director of a number of music publishing companies such as Weil-Brecht Harms Music Corporation, Peppamar Music, Inc., thus enjoying constant involvement in the negotiation and review of financial matters of such companies and their dealings with ASCAP and BMI.

Additionally, Mr. Krasilovsky is co-author of the books, "THIS BUSINESS OF MUSIC" and "MORE ABOUT THIS BUSINESS OF MUSIC," published by Billboard, the leading trade paper of the music industry. Both books have been recognized as leading reference texts by the American Library Association and ASCAP, as well as being respectfully referred to as the "bible" of the music business by working musicians and others involved in the industry.

Extremely specialized as to copyright law, Mr. Krasilovsky has been published on this subject by Columbia Teacher's College, the Copyright Society and the Performing Arts Review and has lectured at the Practicing Law Institute, Yale University, Columbia

Appendix F

University, University of Miami, New York University, Cornell University, and Brigham Young University.

Within recent years, Mr. Krasilovsky has been engaged as an expert witness in a number of litigations in various courts involving the music industry as a specialist in entertainment law. As such, he was presented by the Record Industry Association of America and was quoted favorably on appeal.

Having graduated Cornell University in 1947 and Cornell Law School in 1949 Mr. Krasilovsky has been adjunct professor at New York University during the past three years, teaching a course in ethics in the entertainment business.

APPENDIX G — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED OCTOBER 26, 1992

No. 91-6225

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ACUFF-ROSE MUSIC, INC.,
Plaintiff-Appellant,

v.

LUTHER R. CAMPBELL, A/K/A LUKE SKYYWALKER, ET AL.,
Defendants-Appellees.

ORDER

BEFORE: NELSON and NORRIS, Circuit Judges; and JOINER, Senior United States District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk